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OFFICE SUPREME COURT U.S.
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Supreme Court of the United States

OCTOBER TERM, 1882.

No. 1091.

THE COUNTY OF ALEXANDER,

PLAINTIFF IN ERROR,

vs.

JOHN F. KIMBALL.

ABSTRACT AND STATEMENT OF THE CASE.

ASSIGNMENT OF ERRORS,

POINTS AND AUTHORITIES,

AND ARGUMENT OF

WM. B. GILBERT,

Counsel for *Plaintiff in Error.*

E. E. ELLIS' PRINT, CAIRO, ILL.

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THE COUNTY OF ALEXANDER,

PLAINTIFF IN ERROR,

vs.

JOHN F. KIMBALL.

In error to the Circuit Court of the United States for the Southern District of Illinois.

ABSTRACT AND STATEMENT OF THE CASE.

This was an action of Assumpsit, instituted in said Circuit Court by said Kimball against said county of Alexander, State of Illinois, to recover upon certain alleged interest coupons, detached from and claimed to belong to certain alleged bonds issued by said county after the adoption of the new constitution of Illinois, in force July 2, 1870, in aid of certain Railroads.

The amended declaration (printed Record, p. 5) upon which trial was had, declares, *first* upon certain alleged coupons to Alexander county, *Cairo and St. Louis* Railroad Bonds, and *second* upon certain alleged coupons to Alexander County *Cairo and Vincennes* Railroad Bonds.

The case as respects coupons to *Cairo and St. Louis* Railroad Bonds was abandoned, no evidence whatever being offered as to the same, and a recovery only sought upon the alleged coupons to *Cairo and Vincennes* Railroad Bonds, which alone are in controversy in this case.

The allegations of declaration as respects these alleged conpons to *Cairo and Vincennes* Railroad Bonds, upon which alone recovery was had against plaintiff in error, in so far as the same are material under the pleadings and evidence in the case are, in substance (Rec. 7):

First: That July 2, 1872 (*after constitution 1870*) defendant executed and delivered to the Cairo and Vincennes Railroad Company its one hundred coupon bonds of $1000 each described in Declaration.

Second: That said bonds when so executed and delivered had thereto attached semi-annual interest coupons, described in declaration and *payable in New York.*

Third: That said *bonds and coupons were issued in pursuance of an order made by the county court of said county and authorized by a vote of the citizens of said county prior to July 2, 1870, to-wit: on the———day of July A. D. 1867, in accordance with the laws of the State of Illinois, authorizing said vote.*

Fourth: That plaintiff was a bona fide holder for value, by

purchase, of certain of said Bonds (described in declaration), and that certain coupons (described in declaration) detached from said bonds were due and unpaid—for amount of which coupons plaintiff asks judgment.

By defendant's special pleas (Rec. 10, 11), numbered 2 and 6 (not demurred to and upon which issue was joined), the said "*Third*" allegation of declaration above quoted in *italics*, was expressly denied and put in issue.

And by defendant's other special pleas (Rec. 12), numbered 8 and 9 (not demured to and upon which issue was joined), it was expressly denied that said Bonds and Coupons "*were ever authorized under existing laws by a vote of the people of the said county of Alexander prior to the adoption of the present constitution of the State of Illinois.*"

And by defendant's *additional* plea of the *General issue sworn* to (Rec. 13) filed Sept. 12, 1882, by leave of Court, plaintiff was put upon proof of *all* allegations of his declaration, including *execution, delivery* and *genuineness* of his alleged bonds, and coupons sued on.

A jury was waived and a trial, under the issues thus formed, was had before the Hon. S. H. Treat, district judge, (Rec. 14.)

On said trial (Rec. 16, &c.,) the plaintiff offered as evidence in this cause certain alleged coupons and bonds, in connection with a certain transcript of the records of the county court of Alexander county, and a certain certificate of the auditor and the charter and amended charter of the Cairo and Vincennes Railroad Company; which said coupons, bonds, transcript of

record, auditor's certificate, and charter and amended charter are as follows:

FIRST.

Three hundred and sixty-four detached alleged coupons, fac similes of each other, except as to date of maturity and numbers of bond therein written, amounting in the aggregate to the sum of fourteen thousand five hundred and sixty dollars; one of which coupons is in the words and figures following, to-wit, (Rec. 16).

40.] CITY OF CAIRO, *July 1st*, 1872. [40.

The County of Alexander acknowledges itself to owe the sum of forty dollars, payable to the bearer on the first day of January, A. D. 1877, at the National Bank of Commerce, New York, for six months' interest on bond No. 39, for one thousand dollars, issued to the Cairo and Vincennes Railroad Company.

F. BROSS,
County Judge.

JACOB G. LYNCH,
County Clerk.

(Written on face in red ink:) 9.

Second.

Certain alleged bonds, corresponding in numbers with the numbers written in said coupons, all fac similes of each other, except as to numbers, one of which is in the words and figures following, to-wit, (Rec. 16 and 17):

43.] Alexander County bond. [1,000 dollars.

STATE OF ILLINOIS.

Issued in payment of stock in the Cairo and Vincennes Railroad Company.

Know all men by these presents that the County of Alexan-

der, in the State of Illinois, acknowledges itself indebted and firmly bound to the Cairo and Vincennes Railroad Company in the sum of one thousand dollars, which sum the said county promises to pay to the said Cairo and Vincennes Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, on the first day of July, 1892, together with interest thereon from the first day of July, 1872, at the rate of eight per cent. per annum, which interest shall be payable semi-annually, on the first day of January and July of each year, on the presentation and delivery at said National Bank of Commerce, New York, of the coupons of interest hereto attached. This bond is issued under and in pursuance of an order made by the county court of Alexander county, and authorized by a vote of the citizens of said county and in accordance with the laws of the State of Illinois.

In testimony whereof the said County of Alexander has executed this bond by the county judge and the two associate justices of the county court of said county signing their names hereto, and by the clerk of said court under the
42 order thereof attesting the same and affixing thereto the seal of said court, on first day of July, A. D. 1872.

[CO. SEAL] JACOB G. LYNCH,
Clerk of Co. Court of Alexander Co. Ills,
F. BROSS,
County Judge of Alexander Co. Ills.
JAMES E. McCRITE,
SEVERE MARCHEDON,
Associate Justices of the Co. Court of Alexander Co., Ill.

To which bonds there were still attached 21 coupons similar to copy above given, except numbers and dates of maturity.

Third

Transcript of record of the County Court of Alexander County showing following action of that court, to-wit:

1st. An *order* (Rec. 17) of county court, made *June 4, 1867* providing "that an election be held on the 16th day of July A. D. 1867, for the purpose of determining the wish of the voters of said county, whether or not the county of Alexander should *subscribe to the capital stock* of the said Cairo & Vincennes railroad company the sum of one hundred thousand dollars in bonds of said county, running twenty years from the dates thereof, with interest on said bonds at the rate of eight per cent. per annum"; and that the clerk of the court "give notice accordingly, "said notice to contain all facts required by the statute in such case made and provided."

2nd. An *order* (Rec. 17—19) of the county court, made *Nov. 25 1867*, whereby it is "ordered that the county court agree to and enter into the following contract with said company, to be attested by the county clerk of this county with the county seal attached," viz:

This contract made and entered into by and between Alexander C. Hodges, Judge, and James E. McCrite and John Howley, associate justices of the County Court of Alexander county, Illinois, who act for and on behalf of Alexander county, parties of the first part, and the Cairo and Vincennes Railroad company, party of the second part, witnesseth:

That whereas heretofore, to-wit, on the 16th day of July, A. D. 1867, by a vote of the electors of Alexander county, Illinois, at an election held in said county, the county court was authorized to make a subscription of one hundred thousand

dollars to the capital stock of said Cairo and Vincennes Railroad Company, and to pay for said stock in bonds of Alexander County of the denomination of five hundred dollars each, the bonds to run for twenty years, and to bear interest at the rate of eight per centum per annum, payable half-yearly on the first day of January and July of each year in the city of New York; said Alexander county being required by the laws of this State to issue installments of said bonds from time to time as assessments may be made upon said stock by said railroad company; and whereas said railroad company proposes to guaranty that work on said railroad shall be commenced at Cairo within six months from the date of this contract, and that the construction of the road-bed and laying the track from Cairo northward shall be pushed with reasonable dispatch, and also to release the county of Alexander from the obligation to issue any part of said bonds until the said railroad shall be built from Cairo to the boundary line between Alexander and Pulaski Counties, and also to purchase of Alexander County the stock of said company to be issued to said county upon the delivery of the county bonds aforesaid:

It is therefore hereby stipulated and agreed by and between the parties aforesaid as follows:

ARTICLE FIRST.—The parties of the second part agrees that work on said railroad shall be commenced at Cairo within six months from the date of this contract, and that the construction of the road-bed and laying the track from Cairo northward shall be pushed with reasonable dispatch.

ARTICLE SECOND.—The parties of the second part agrees that, instead of the county of Alexander issuing bonds in payment fo stock upon assessments made from time to time by said railroad company, the connty of Alexander shall issue fifty thousand dollars of bonds and deliver the same to said

company in payment for stock when the track of said railroad shall have been laid to the county line between Alexander and Pulaski Counties, and cars have run thereon; and said county shall issue other fifty thousand dollars of bonds as aforesaid and deliver the same to said company, in payment for stock, when the track of said railroad shall have been laid and cars shall have run thereon from the city of Cairo to the further line of Pulaski County.

ARTICLE THIRD.—The party of the first part hereby agrees to issue fifty thousand dollars of bonds of Alexander County, in payment for fifty thousand dollars of stock of the Cairo and Vincennes Railroad Company, and deliver said bonds to said company whenever the railroad track of said company shall be laid from the city of Cairo to the boundary line between the counties of Alexander and Pulaski and cars shall have run thereon, and also to issue fifty thousand dollars of said bonds in payment of stock aforesaid, and deliver the same to the said company whenever the railroad track of said company shall have been laid from the city of Cairo to the boundary line between the counties of Pulaski and Johnson, and cars shall have run thereon.

ARTICLE FOURTH.—And whereas the early construction of said railroad is of vast importance to said county, therefore, in consideration of the stipulations made by the party of the second part in article first and second of this contract, and in consideration of the sum of five thousand dollars to be paid by the said party of the second part as hereinafter stated, the parties of the first part hereby agree to sell and transfer to said party of the second part the one hundred thousand dollars stock of said railroad company, to be issued to Alexander County, Illinois, in payment for one hundred thousand dol-

lars county bonds, at and for the sum of five thousand dollars, as follows:

When fifty thousand dollars of the stock of said company shall be issued to Alexander County the parties of the first part agree to transfer and assign the same to the party of the second part on payment of twenty-five hundred dollars in Alexander County bonds, and when other fifty-thousand dollars of stock of said company shall be issued as aforesaid the parties of the first part agrees to transfer and assign the same to the party of the second part on payment of twenty-five hundred dollars of Alexander County bonds.

This contract is executed in duplicate and made and signed by the parties of the first part in open court at the city of Cairo, Alexander county, Illinois, and made a matter of record in said court. The whole done and executed this 25th day of November, A. D. 1867.

Witnesses our hands and seals.

ALEXANDER C. HODGES, [SEAL.]
County Judge Alexander county.

JOHN HOWLEY, [SEAL.]
Associate Justice Alexander county

JAMES E. McCRITE, [SEAL.]
Associate Justice Alexander county,

GREEN B. RAUM, [SEAL]
President Cairo & Vincennes R. R. Co.

3rd. An unimportant and immaterial *order* (Rec. 20) made *May 20, 1868*, merely extending time for commencing construction of road "for the term of thirty days from May 25, 1868."

Said three orders above recited were the only orders made or action taken *prior* to the new Illinois constitution of 1870, in force July 2, 1870, as shown by said Transcript; which further shows the following other orders *after* that date; viz:

4th. An *order* (Rec. 20) made *July 16 1870*, merely extending time for completion of said road to Dec. 1, 1872, "provided said company shall commence the building of said road on or before the first day of December next, and shall diligently prosecute said work until said road is completed."

5th. An *order* (Rec. 20 and 21) made *December. 5, 1870 as follows:*

"Whereas on the 16th day of July 1867, the voters of Alexander county voted one hundred thousand dollars to the capital stock of the Cairo and Vincennes railroad company, in pursuance of an order of the court made at the June Term, 1867, and

Whereas on the 25th day of November, 1867, the county court of Alexander county and Green B. Raum, as president of the Cairo & Vincennes railroad company, entered into a contract whereby said county court, for and in behalf of said county, agreed to issue one hundred thousand dollars in county bonds, payable twenty years after the date of issue of such bonds, with interest at the rate of eight per cent. per annum, payable semi-annually to said railroad company in installments, as stipulated in said contract. In consideration of said bonds as aforesaid, the said railroad company agreed in said contract to issue to said Alexander county one hundred thousand dollars stock in said Cairo and Vincennes Railroad.

And whereas the said county court of said county agreed in the same contract with the said railroad company to sell said one hundred thousand dollars stock in said railroad when issued back to said railroad company, in and for the consideration of five thousand dollars in county bonds of Alexander county, thereby virtually giving and *donating* to said railroad company ninety-five thousand dollars in Alexander county bonds, with eight per cent. interest per annum on said bonds for twenty years, said interest amounting to one hundred and fifty-two thousand dollars, and the interest and principal to the amount of two hundred and forty-seven thousand dollars; and whereas the vote of the people of said county on said subscription to said capital stock of said railroad company, did not authorize the county court to sell said stock at a mere nominal sum, and thereby donating to said railroad company said amount above stated, which action is not warranted by law;

And whereas more than a reasonable length of time had elapsed for the construction and completion of said railroad, and also the extension of time granted on said contract, requiring said railroad company to commence said work within six months from the date of said contract and to finish said work with reasonable dispatch to completion, and extension granted requiring said railroad company to commence work on or before the first day of December, 1870, and with dispatch prosecute said work until completed, and said railroad company has failed to comply with said contract and requirements of said extension; it is therefore

Ordered, that said contract is hereby declared *null and void* and of no effect, and not considered binding any longer this

county to any of its stipulations, and it is further ordered that the clerk of this court notify the representative of said railroad company in this county of this order."

6th. An *Order* (Rec. 21 and 22) made *March 11, 1871*, and and an *Order* (Rec. 22 and 23) made *May 2, 1871*, referring to a proposition of railroad company to again recognize said contract of Nov. 25, 1867, (rescinded by said order of Dec. 5, 1870,) by issuance of bonds under it to be placed in hands of a Trustee; which proposition the court declines to acceed to, but, by a counter proposition, expresses a willingness to make a simple *subscription* as voted, upon certain conditions, as to commencement of work in sixty days, &c., &c., which counter proposition is not accepted by the railroad company, or ever acted upon, as a basis of the subsequent issue of the bonds in question; and both these orders may therefore be regarded as immaterial to a decision of this case.

7th. An *Order* (Rec. 23) made *March 6, 1872*, as follows:

Whereas the people of Alexander county, State of Illinois, did on day of , 1867, by a legal majority authorize the county court of said county to subscribe the sum of one hundred thousand dollars to the capital stock of the Cairo and Vincinnes Railroad Company, payable in the bonds of said county:

Now, therefore, we, the county court of said county of Alexander, in the State of Illinois, for and on behalf of the said county, do hereby subscribe for one thousand shares of one hundred dollars each of the capital stock of the Cairo and Vincennes Railroad Company, said subscription to be paid in the bonds of Alexander county at par, bearing interest at the

rate of eight per cent. per annum, payable semi-annually and the principal of said bonds payable in the city of New York, twenty years after date. *This subscription in no way interferes with or invalidates the contract for sale of said one thousand shares of capital stock, which contract now is existing between said county and said railroad company*, and this court hereby recognizes that the said company have commenced and prosecuted the work on the said railroad in accordance with the orders of this court.

8th. An *Order* (Rec. 23), made *March 11, 1872*, whereby:

"It is ordered that the bonds of one hundred thousand dollars heretofore voted to the Cairo and Vincennes Railroad Company by the legal voters of Alexander county be issued this term, and placed in the hands of a trustee to be delivered to the said Cairo and Vincennes Railroad company; and that A. B. Safford, S. Staats Taylor and Paul G. Schuh, be, and they are hereby, appointed trustees to hold in trust the bonds to be issued to the Cairo and Vincennes Railroad company, to hold and deliver said bonds to said company, or to return them to the county court of said county, according to the orders heretofore made by this court in the premises."

9th. An *Order* (Rec. 24), made *March 12, 1872*, as follows:

"Be it remembered that on this day one hundred of the county bonds, of one thousand dollars each, drawing eight per cent. interest, payable 20 years from date, July 1st, 1872, at the city of New York, were this day issued to the Cairo and Vincennes Railroad company, signed, sealed, and delivered to A. B. Safford, S. S. Taylor, and Paul G. Schuh, trustees, appointed

by the court to hold said bonds until the Cairo and Vincennes Railroad company is entitled *under their contract with the county* to receive them."

10th. Orders made June 5, and December 27, 1872, (Rec. 24-26) approving Report of said Trustees, showing: completion of railroad December 13, 1872; and delivery by said Trustees to said railroad company of $95,000 of the said bonds in their hands as trustees, on the 14th day of December, 1872, under and in pursuance of said contract of November 25, 1867, (*declared void by said order of December 5, 1870, and subsequently revived by said order of March 6, 1872,*) and the said subsequent orders of the court; and retention by said Trustees of the remaining $5,000 of said bonds, which they hold subject to the order of the court; and which the court then and there orders said Trustees to deliver up to the County Treasurer for cancellation.

11th. Orders made March 6th and 7th, 1873, (Rec. 26-27) approving receipt of County Treasurer to said Trustees for said $5,000 of bonds, retained by the county under said "*original agreement,*" (Nov. 25, 1867), between said county and said railroad company; and ordering same to be cancelled, which is done in open court.

Fourth.

Certificate of Auditor as follows (Rec. 27):

STATE OF ILLINOIS,

County of Alexander:

CAIRO, Dec. 26th, 1872.

To the auditor of public accounts of the State of Illinois:

SIR: I hereby certify that the following described bonds are entitled to registration in your office under the provisions of the act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16th, 1869; the bonds being numbered from No. one to No 95, incl., for $1,000 each, dated Jan'y 1st, 1872, and payable July 1st 1892, being in all 100 bonds and amounting to $100,000, and bearing interest at the rate of eight per cent. per annum, payable semi-annually on the 1st days of January and July. These bonds are issued by the County of Alexander, in the County of Alexander and State of Illinois, to the Cairo and Vincennes railroad company, under and by authority of the provisions of an act entitled "Subscriptions in aid of railroads," approved Nov. 16th, 1849, and subsequent acts and by a vote of the people of said county, at an election held on the 16th day of July, 1867 (1869), and I, as judge of the county court of said county do hereby certify that all the preliminary conditions in the act in force April 16th, 1869, required to be done to authorize the registration of these bonds and entitle them to the benefits of said act last referred to have been fully complied with to the best of my knowledge and belief.

F. BROSS,
Co. Judge.

Subscribed and sworn to by the said F. Bross before me this 26th day of Dec. A. D. 1872.

JACOB G. LYNCH,
Co. Clerk.

AUDITOR'S OFFICE, ILLINOIS,
Springfield, July 11th, 1879.

I, Thomas B. Needles, auditor of public accounts of the

the State of Illinois, do hereby certify that the foregoing and annexed instrument is a true, full, and correct copy of the certificate of F. Bross, county judge of the county of Alexander, State of Illinois, in relation to the registration of bonds issued by the county of Alexander in aid of the Cairo & Vincennes railroad, dated Dec. 28th, 1872, now on file in and forming part of the records of this office.

In testimony whereof I hereunto subscribe my name and affix the seal of my office at Springfield the day and year first above written.

[L. S.]

T. B. NEEDLES,
Auditor Public Accounts.

Fifth.

The charter, and amendments (Rec. 28) of the Cairo & Vincennes railroad company, found in 2nd vol. Private Laws, Ill. 1867, page 558, and 3rd vol. Private Laws, Ill. 1869, page 255.

As the said order calling the election and supposed vote in pursuance thereof was had under the General Law of 1849, authorizing subscriptions in aid of railroads, said original charter is of no consequence; and the said amendments (amended charter, approved Feb'y 9, 1869) is only proper to be considered, as respects the 3rd section thereof, because, expressly recognizing said contract of Nov. 25, 1867 as a mere *donation* unauthorized by said General law of 1849 (which authorizes no donation) or the said supposed vote of the people (which was for a $100,000 *subscription* and *not* a $95,000 *donation* of bonds), attempts to legalize such donation contracts.

Said General Law of 1849 (Gross. Stat. Ill. 1868, p. 547) is as follows:

AN ACT supplemental to an act entitled "an act to provide for a general system of railroad incorporations."

SECTION 1. *Be it enacted by the people of the state of Illinois, represented in the general assembly,* That whenever the citizens of any city or county in this state are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated under any law of this state, such city or county may, and are hereby authorized to *purchase* or *subscribe* for shares of the capital stock in any such company, in any sum not exceeding one hundred thousand dollars for each of such cities or counties; and the stock so subscribed for or purchased, shall be under the control of the county court of the county or common council of the city making such subscription or purchase, in all respects as stock owned by individuals.

§ 2. That for the payment of said stock, the judges of the county court of the county, or the common council of the city making such subscription or purchase, are hereby authorized to borrow money at the rate not exceeding ten per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal, or if the said judges or common council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county, making such subscription to be drawn for that purpose, in sums not less than fifty dollars, bearing interest not exceeding

ten per centum per annum; *Provided*, that no bond shall be paid out at a rate less than par value.

§ 3. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this state, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company, at par, and in lieu of cash, and to issue their bonds bearing interest not exceeding ten per centum per annum for any monies by them borrowed for the construction of their railroad and fixtures, or for the purchase of engine and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

§ 4. No subscription shall be made, or purchase or bond issued, by any county or city under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county, or by the common council of any city, to pay any such subscription, "unless a majority of the qualified voters of such county or city, (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act for county officers,) shall vote for the same; and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days notice, in the same manner as notices are given for election of state or county officers in said counties, requiring said electors of said counties or said cities to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount

which it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear; or in case it is proposed to borrow money to pay such *subscription*, then the notices shall state the terms upon which such loan is to be effected; and the opinion of the electors shall be expressed upon their ballots "for subscription," or "against subscription," and counted and returned by the judges and clerks of elections as in other cases; and if a majority of the voters of said county or city—assuming the standard aforesaid, shall be in favor of the same—such authorized subscription or purchase, or any part thereof, shall then be made by said judges or common council. In case any election had under this act is held upon a day of a general election, then the number of votes thrown at such general election for county officers shall be the standard of the number of qualified voters as aforesaid. *No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.*

Said section 3 of amended charter, Cairo and Vincennes Railroad company, is as follows:

"§ 3. *Be it further enacted*, that all contracts made by towns, cities and counties, into, through or near which the Cairo and Vincennes Railroad shall run, whereby, as an inducement for the construction of said railroad, such towns, cities and counties agreed, upon the completion of certain portions of said railroad, to *sell* to the said company, at a *nominal* price, the stock of said company for which said towns, cities or counties, by

a vote of their electors, had theretofore subscribed, and agreed to issue bonds in payment thereof, thereby, in effect, agreeing to make a *donation* to said company of certain amounts of the bonds of such towns, cities or counties, as an inducement for the construction of said railroad, are hereby declared to be valid and binding upon such towns, cities and counties, and shall be carried into effect, in good faith, by the same; and all orders for and notices of elections, and elections and returns of such elections, in respect to such subscriptions of stock to said company, in any such towns, cities and counties, are hereby declared to be valid and binding upon such towns, cities or counties."

To the introduction in evidence of the foregoing and above-mentioned alleged "Coupons," "Bonds," "Transcript of Record," and "Auditor's Certificate," each respectively, the defendant, then and there at the time (Rec. 28) severally objected as follows:

First.

To said coupons and bonds, each severally and respectively because:

1. The genuineness of the signatures to said coupons and bonds *severally and* respectively, had not been proven and due execution thereof shown.

2. The proofs showed that the only vote had by the people prior to the constitution of 1870 was a vote for a *subscription*, and that the bonds which were issued to the Cairo and Vincennes Railroad company (even if those offered in evidence *were* proven to be genuine and of that issue) were in fact (as

disclosed by said Transcript of Record) issued as a *donation.*

3. That the bonds having been issued since the adoption of the Illinois constitution of 1870, the recitals therein could not be received as evidence to establish a prior vote of the people, nor estop defendant from showing, as the proofs showed, that the vote was for a *subscription* and the bonds were issued as a *donation.*

4. That no authority had been shown authorizing the issuance of the bonds.

Second.

To said transcript of record in so far as the same was offered to bind defendant by any recitals made therein since constitution of 1870; (for, "*whatever action the county court may have taken since the new constitution is of no consequence,*" unless a prior vote of the people has first been shown, and such action is in accordance with and authorized by such vote; and in the present instance, no prior vote had been shown as a fact by proper evidence; and even the alleged vote recited in said order of Nov. 25, 1867, was a vote for a $100,000 *subscription,* and the whole record of the county court shows that the bonds issued to the C. & V. railroad company, were issued, in pursuance of, and as a $95,000 *donation.*)

Third.

To said auditor's certificate in so far as offered to conclude the defendant by any statements therein made since constitution of 1870; (*because* made since July 2, 1870, and *because* such admissions are *inter alios* and not binding evidence against the county).

But the court overruled said objections severally and respectively (Rec. 29), and admitted in evidence said bonds and coupons, transcript of record, auditor's certificate, charter, and amendments. To which action of the court in overruling said objections, severally and respectively, and admitting in evidence said coupons, bonds, transcript of record, and auditor's certificate, severally and respectively, said defendant then and there excepted. This was all the evidence offered by either party, except that it was admitted that the said transcript of record of county court contained and showed the only action taken by the county court or the people with reference to the issuance of bonds to the Cairo and Vincennes railroad company. And upon the evidence aforesaid the court specially found:

1st. That the said coupons and bonds offered in evidence had been duly executed and delivered by defendant.

2nd. That they had been so executed and delivered as a subscription to the capital stock of the Cairo & Vincennes railroad company in pursuance of and according to a vote of the people had under existing laws prior to the adoption of the constitution of 1870.

And upon the special findings aforesaid the court thereupon found the issues for plaintiff, and assessed his damages at the amount of said coupons, with six per cent. interest thereon from their maturity. To which special findings, general finding, and assessment of damages the defendent then and there severally and respectively excepted and objected as follows:

1st. As to said special finding as to the genuiness, due ex-

ecution, and delivery of said coupons and bonds respectively offered in evidence; that the same was not justified by the proofs.

2nd. As to said special finding as to said coupons and bonds having been executed and delivered as a subscription to the capital stock of the Cairo & Vincennes railroad company in pursuance of and according to a vote of the people had under existing laws prior to the adoption of the constitution of 1870; that the same was not justified by the proofs.

3rd. As to said general finding of issues for plaintiff; that the same was not justified by the proofs, and was contrary to the evidence.

4th, As to said assessment of damages; that the same was excessive to the amount of the interest included therein, because no demand of payment had been proven and no interest recoverable under the laws of Illinois.

But the court (Rec. 29) overruled said exceptions and objections severally and respectively, and gave judgment for plaintiff upon said findings; to all of which, severally and respectively, and to the said judgment as rendered by the court, the defendant then and there at the time objected and excepted.

The judgment, so rendered and excepted to as aforesaid, is as follows, (Rec. 14):

"It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of seventeen thousand seven hundred and ninety-four dollars and sixty-

four cents, his damages aforesaid assessed, together with the sum of one hundred and thirty-three dollars and twenty-three cents, his costs and charges by him about his suit in this behalf expended, *and that execution issue therefor.*"

ERRORS ASSIGNED.

The county of Alexander, plaintiff in error, by its attorney, now alleges and assigns, the following separate and specific errors, which appear in the foregoing proceedings and rulings of the Circuit court; to each and all of which proceedings and rulings the defendant at the time severally and respectively excepted :

1. The court erred in overruling (Rec. 29) defendants' objections (Rec. 28) to said coupons (Rec. 16).

2. The court erred in admitting in evidence (Rec. 29) said alleged coupons (Rec. 16) against said objections of defendant (Rec. 28).

3. The court erred in overruling (Rec. 29) defendants objections (Rec. 28) to said Bonds (Rec. 16).

4. The court erred in admitting in evidence (Rec. 29) said alleged bonds (Rec. 16) against said objections of defendant (Rec. 28).

5. The court erred in overruling (Rec. 29) defendants objections (Rec. 28) to the admissibility of said Transcript of Record as evidence to bind defendant by the recitals therein made (Rec. 20, 21, 23) since constitution of 1870.

6. The court erred in admitting (Rec. 29) said Transcript of Record, as evidence to bind defendant by the recitals therein made (Rec. 20, 21, 23) since constitution of 1870, against the objections of defendant (Rec. 28.)

7. The court erred in overruling (Rec. 29) defendant's objections (Rec. 28) to said Auditor's Certificate (Rec. 27).

8. The court erred in admitting (Rec. 29) as evidence to conclude defendant, the said statements made in said Auditor's Certificate since constitution of 1870 (Rec. 37), against defendant's said objections (Rec. 28).

9. The court erred in its said special finding (Rec. 29) "that the said coupons and bonds offered in evidence had been duly executed and delivered by defendant."

10. The court erred in its said special finding (Rec. 29) "that they had been so executed and delivered as a *subscription* to the capital stock of the Cairo and Vincennes Railroad company in pursuance of according to a vote of the people had under existing laws prior to the adoption of the constitution of 1870."

11. The court erred in finding (Rec. 29) the issues for plaintiff.

12. The court, in its assessment of damages (Rec. 29) erred in allowing interest upon said coupons from their maturity.

13. The court erred in overruling (Rec. 29) defendent said exception "1st" (Rec. 26) viz: "As to said special finding as to the genuineness, due execution and delivery of said coupons, that the same was not justified proofs."

14. The court erred in over-ruling (Rec. 29) defendant's exception "2nd" (Rec. 29) viz: "As to said special finding as

to said coupons and bonds having been executed and delivered as a *subscription* to the capital stock of the Cairo & Vincennes railroad company in pursuance of, and according to a vote of the people had under existing laws prior to the adoption of the constitution of 1870, that the same was not justified by the proofs."

15. The court erred in over-ruling (Rec. 29) defendant's exception "3rd" (Rec, 29) viz: "As to said general finding of issues for plaintiff, that the same was not justified by the proofs, and was contrary to the evidence."

16. The court erred in over-ruling (Rec. 29) defendant's exception "4th" (Rec. 29) viz: "As to said assessment of damages, that the same was excessive to the amount of the interest included therein, because no demand of payment had been proven and no interest recoverable under the laws of Illinois."

17. The court erred in its said judgment *as rendered* (Rec. 29) viz: *in awarding execution* (Rec. 14) against defendant.

WM. B. GILBERT,
Att'y for Defendant.

POINTS AND AUTHORITIES SUBMITTED ON BEHALF OF PLAINTIFF IN ERROR.

I.

The following three propositions alone or either of them—all covered by the errors assigned and exceptions taken at the time—must reverse the judgment and remand the cause, regardless of the question of validity of the series of Cairo and Vincennes Railroad bonds (mentioned in the "Transcript of Records of county court" offered in evidence, and) *attempted* to be drawn in question in this case, but not as fully and fairly presented (in the absence of any evidence whatever on the part of defendant) as might have been the case, but for the confidence on the part of its counsel that the alleged coupons of plaintiff were wrongfully admitted in evidence without proof of their genuineness.

1. The general issue, *sworn to*, filed in this case put plaintiff upon proof of the genuineness and due execution of his alleged coupons sued on, as well as his bonds, and, there having been no such proof offered or made, and the same having been expressly objected to on that ground, among others, the same should have been excluded as evidence, and verdict and judgment rendered for defendant.

Rev. Stat. Ill. (1874) ch. 110, Sec. 33;

Hinton vs. *Husbands*, 3 Scam., 187;

Glazier vs. *Streamer*, 57 Ill., 91 and 94;

Davis vs. *Scarritt*, 17 Ill., 202;

McCartney vs. *New*, 91 Ill., 129;

Anthony vs. *County of Jasper*, 101, U. S., 699.

2. Even if plaintiff had proven genuineness of his coupons and had otherwise been entitled to recover thereon, he was not, by the laws of Illinois under which they were issued, as uniformerly interpreted by the Supreme Court of Illinois long prior to and at the time of their issuance, entitled to interest thereon, as given by the court

City Pekin vs. *Reynolds*, 31 Ill., 529;

Johnson vs. *Stark Co.*, 24 Ill,, 91;

People vs. *Taswell Co.*, 22. Ill., 147;

3. Even if the law of the state, as expounded by its decisions forming part of the contract under which plaintiff received his coupons, could be dis regarded and a recovery had for full amount of principal and interest, yet it was error in the court, in the rendition of its judgment, to have awarded *execution* therefor against the county, defendant. Since the recent prac-

tice act of Congress, the Federal court must conform, in its practice and proceedings to the state practice.
City Kinmundy vs. Mahan, 72 Ill., 462.
Stat. Ill. 1874 (Hurd), ch. 24, Art. VII. Sec. 90. p. 219.

City of Chicago vs. *Hasley*, 25 Ill., 595.

Henry Brink vs O'Neil (Decision U.S. Sup. Ct. Dec.

II.

It is essential to validity of railroad aid bonds issued since new constitution, that there should have been a prior vote authorizing such issuance; and such vote is a jurisdictional fact that must be shown to have an actual existence, regardless of admissions or recitals in the bonds, before such admissions or recitals can be received as evidence, or can work an estoppel.

1. "No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation: *Provided, however*, that the adoption of this Article shall not be construed as effecting the right of any such municipality to make such subscriptions where the same have been *authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption.*"

Ill. Cont. 1870. (Rev. Stat. 1874), separate section, in force July 1, 1870, entitled "*Municipal subscriptions*

to Railroad or private corporations."

2. The existence of a prior vote goes to the question of jurisdiction and *power*. Unless when the new constitution went into force, such vote had then in *fact* been had, authorizing the act subsequently done, be it a subscription or donation, there was a total absence of power to do the act; and a vote to take stock does not authorize a donation.

Commissioners vs. Thayer, 94 U. S. 631;

Davis vs. Huidekoper, 98 U. S. 100;

County Leavenworth vs. Barnes, 94 U. S. 71;

McClure vs. Town Oxford, 94 U. S. 429;

Town Middleport vs. Aetna Insurance Co., 82 Ill., 562.

Lippencott vs. Town Pana, 92 Ill. 24;

Gladdis vs. County Richland, 92 Ill., 119;

Jackson County vs. Brush, 77 Ill., 59:

People, &c. vs. Jackson County, 92 Ill., 441.

3. If this be a question of power, then the existence of the power must be affirmatively shown, outside of mere admissions and recitals; for mere admissions and recitals can not *create* the power.

Davis vs. *Huidehooper*, 98 U. S., 100;

Shaffer vs. *Bondham*, 95 Ill., 381;

And authorities above cited.

4. "If the State Supreme court gives construction to the language of a statute and there have been no conflicting decisions, this court, as a general rule, follows the construction, thus given;" *County Leavenworth vs. Barnes, 94, U. S. 71.*

5. The unbroken line of decisions, admitting recitals in bonds as evidence against, and binding upon, municipalities, are based upon the principal that "*These recitals are municipal decisions made by the appointed tribunal selected by the legislature according to a true construction of the legislative enactment under which they acted, and are therefore res-adjudicatur.*"

From case of *Knox County vs. Aspinwall* down to 1873, and the numerous decisions from 1873, down to recent case of *Buchanan vs. Litchfield* 102 U. S. 278, all announce this principle as the sole and only ground upon which recitals are held to bind a municipality as evidence against it, curing informalities in issuance of bonds and operating as an estoppel.

Dillon's "Law of Municipal Bonds," pgs. 19, 20, 21, 44, 45 and 51;

Dillon's "Municipal Corporations," Sec. 419;

Marcy vs. Town of Oswego, 92 U. S. 637;

Commissioners vs. Bolles, 94 U. S. 109;

Commissioners vs. January, 94 U. S. 205;

Town Rock Creek vs. Strong, 96 U. S. 272;

Buchanan vs. Litchfield, 102 U. S. 278.

6 The distinction between the case at bar and the cases in which the above principal is enunciated, where the legislature, authorizing issuance of bonds upon the happening of some contingency *in futuro*, made, "upon a true construction of the law," the officers a special tribunal to ascertain the existence of preliminary facts, occuring *in futuro*, whose findings should be conclusive on all courts, is, that the Illinois constitution is not a mere directory law, authorizing execution of bonds upon some contingency *in futuro*; but the fundamental law of the land, positive in its prohibitions of delegated power and forbidding all bonds unless a certain contingency had already in fact taken place.

Matters of contested application of that law are matters of judicial decision. No tribunal can be invested with power to decide them but the *courts*. For if it were otherwise, and mere admissions and recitals of the municipal officers could be received to establish them, then the fundamental law of the land, which even the legislature itself can not violate, could for all time to come, be perpetually evaded by mere subordinates and

creatures of the legislature, thus making the creature more potent that the creator.

Town of Middleport vs. Aetna Insurance Co., 82 Ill. 562.

Lippencott vs. Town of Pana, 92, Ill., 24;

People, &c., vs. County Court Jackson Co., 92, Ill., 441.

And other authorities before cited.

7. No Federal decision can be found in conflict with the above propositions, the point never having been fairly presented or pressed upon the attention of that court; but they are the construction placed upon the constitution by its own courts—they violate no principle of decision of the Federal courts, and are in fact recognized in some of the decisions of that court.

County Leavensworth vs. Barnes, 94 U. S. 71.

Town Concord vs. Savings Bank, 2 Otto, 625.

Buchanan vs. Litchfield, 102 U. S. 278, 289, 290, latter case directly touches the question, though relating to a constitutional provision involving a contingency *in futuro*; and not *in presenti*; as in case at bar which presents much stronger grounds.

III

Said donation contract of Nov. 25, 1867, was

unauthorized by the vote therein recited and was void, as are also the bonds issued in conformity with it, the same having been issued as a donation, and not a subscription as voted by the people.

1. It is clear that the proposition submitted to the people, and the vote recited in the contract, was a *subscription* and not a *donation*. (Rec. 17 and 18).

It is also clear that the law of 1849, (ch. 862, sec. 80, Gross Stat. 1878,) under which the vote was had, did not authorize a *donation*.

It is also clear from an examination of this contract, if *legal effect* and not mere *words* are to be regarded, that it amounted in truth, fact and law to be a mere donation of $95,000 of bonds, instead of a $100,000 subscription as voted (Rec. 19).

Courts will only look at the *substance* and not the idle and deceitful *form* of the contract. The *pretended* subscription and the *actual* donation are one and the same act, and its ultimate legal effect must be considered as a whole in order to determine what it is. Municipal officers can not do *indirectly* what they are forbidden to do *directly*.

The language used is a mere subterfuge to evade the

law of '49 and thwart the will of the people as expressed in their vote.

It is expressly declared in the subsequent order of the court, Dec. 5, 1870 (Rec. 21), to have been a donation, and so recognized in said "amended charter" attempting to legalize it (laws 1869, vol. 3. p. 259;) and such it in fact was and is.

Macoupin Co. vs. The People, 58 Ill. 195.

Madison Co. vs. The People, 58 Ill. 463.

Had there been a valid subscription first made, and, *afterwards* as a separate transaction and consideration an agreement to sell the stock, a different case would be presented; but here the very act of subscribing and selling in such manner as to convert the *nominal* subscription into the *real* donation renders the act a donation, by whatever name it may be called.

The distinction between a donation and a subscription is fully recognized in *Town Concord vs. Savings Bank, 2 Otto, 625.*

2. Said void and unauthorized contract of Nov. 25, 1867 (Rec. 18) could not be legalized by said "amended charter" (Laws 1869, vol. 3. p. 259.) and the attempt to do so, was in violation of the constitution and void. The people could not be compelled to make a donation they never voted for.

issued "in accordance with the "*Constitution of Illinois;*" and all that is said in *Buchanan vs. Litchfield*, 102, U. S.; 278, 289, 290 &c., in regard to the recitals of the bonds in that case, apply with same force to the case at bar; and upon the authority of that case it is insisted that the recitals in plaintiff's bonds are insufficient to estop defendant from proving, as the record offered by plaintiff affirmatively shows, that "This bond is" *not* issued under and in pursuance of an order made by the County Court of Alexander County, and authorized by a vote of the citizens of said county" *had prior to July 2, 1870*, and in accordance with the laws of the state of Illinois," *and the constitution thereof.*

V.

Under the issues made by the declaration and pleas, the evidence offered was wholly insufficient to warrant a verdict.

1 If the coupons and bonds are excluded as they should be, there is n thing to base a verdict upon; and, even if admitted, no prior vote of any kind is proven, outside of recitals made after new constitution went in force, except recitals in donation contract of Nov. 25, 1867 (Rec. 18), which should be excluded as unauthorized and void, as also as rescinded by order of Dec. 5, 1870 (Rec. 21); and even if the recitals prove a vote, it was for *subscription* and *not* a donation, and these bonds were in fact issued as a donation.

See authorities before cited.

2. Even if the bonds were valid, still no recovery can be had upon the coupons, because of plaintiff's failure to prove a demand at County Treasury before suit.

The law of 1849, under which the vote was had, did not authorize these bonds or coupons to be made payable out of the State; and, notwithstanding they are so made payable, such part of the bonds and coupons may be rejected as surplusage, and they are only due and payable upon presentation at the County Treasury.

If payment is desired, a demand therefor should be made at the Treasury; and until such demand the county is not in default; and if not in default, then the right of action is not complete until such demand has been made and proven. Municipalities, unlike individuals, are not, in the State of Illinois and under its laws, bound to seek its creditors or pay elsewhere than at its Treasury; and plaintiff took his coupons in face of the law so declared

People vs. Taswell Co., 22 Ill., 147;

Johnson vs. Stark Co., 24 Ill., 91;

City Pekin vs. Reynolds, 31 Ill., 529.

Elmwood vs. Marcy, 92 U. S.; 289;

Barnes vs. Town Lacon, 84 Ill., 463;

Marshall vs. Sillman, 61 Ill., 218.

But even if it had such effect, this contract was annulled by the order of December 5, 1870, (Rec. 21) and the bonds were issued not under this annulled contract, but (after the adoption of the constitution) under the order of March 6, 1872, (Rec. 23) reviving this contract —therefore a new contract similar in terms with the old one previously annulled, which *new* contract said amended charter did not profess to legalize, and could not, if it did, because the constitution had intervened to cut off all donations, not previously voted for.

IV.

The recitals in these bonds are insufficient to estop the county, even if admissible as evidence.

1. No vote for a *donation* was ever had, and "there is an absolute want of jurisdiction to proceed further in the matter, and an attempt to do so is void, as are also *all proceedings or issues* based upon it;"

Commissioners vs. Thayer, 94 U. S., 631.

There was a total want of *power*, and "no *bonifides* can dispense with this and no *recitals can excuse it*."

Davis vs. *Hindehoper*, 98 U. S., 100.

2. The failure of the recital in the bond (Rec. 17) to specify the date of the vote and bring the bonds within the constitutional proviso, was sufficient to have put the purchaser upon inquiry; and being "put upon inquiry" he would, by the exercise of "ordinary diligence," have learned that the recitals were false and the bonds void; and "every man is chargeable with notice of that which the law requires him to know, and of that which, *after having been put upon inquiry*, he might have ascertained by the exercise of reasonable diligence;"

McClure vs. Town of Oxford, 94, U. S., 429;

Dillon's Municipal Bonds, 44, and 45;

County Leavensworth vs. Barnes, 94 U. S. 71;

Town Concord vs. Savings Bank, 2 Otto, 625;

Buchanan vs. Litchfield. 102 U. S. 278, 289, 290; which latter case directly touches the question, though relating to a constitutional provision involving a contingency *in futuro*; and not *in presenti*; as in case at bar which presents much stronger grounds.

3. The recitals not only do not, by reason of failure to specify *date* of alleged vote inform the purchaser that the bonds are within the saving clause of the constitution, but they fail to show or recite that the bonds were

issued "in accordance with the "*Constitution of Illinois;*" and all that is said in *Buchanan vs. Litchfield*, 102, U. S.; 278, 289, 290 &c., in regard to the recitals of the bonds in that case, apply with same force to the case at bar; and upon the authority of that case it is insisted that the recitals in plaintiff's bonds are insufficient to estop defendant from proving, as the record offered by plaintiff affirmatively shows, that "This bond is" *not* issued under and in pursuance of an order made by the County Court of Alexander County, and authorized by a vote of the citizens of said county" *had prior to July 2, 1870*, and in accordance with the laws of the state of Illinois," *and the constitution thereof.*

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See authorities before cited.

2. Even if the bonds were valid, still no recovery can be had upon the coupons, because of plaintiff's failure to prove a demand at County Treasury before suit.

The law of 1849, under which the vote was had, did not authorize these bonds or coupons to be made payable out of the State; and, notwithstanding they are so made payable, such part of the bonds and coupons may be rejected as surplusage, and they are only due and payable upon presentation at the County Treasury.

If payment is desired, a demand therefor should be made at the Treasury; and until such demand the county is not in default; and if not in default, then the right of action is not complete until such demand has been made and proven. Municipalities, unlike individuals, are not, in the State of Illinois and under its laws, bound to seek its creditors or pay elsewhere than at its Treasury; and plaintiff took his coupons in face of the law so declared

People vs. Taswell Co., 22 Ill., 147;

Johnson vs. Stark Co., 24 Ill., 91;

City Pekin vs. Reynolds, 31 Ill., 529.

ARGUMENT OF WM. B. GILBERT ON BEHALF OF PLAINTIFF IN ERROR.

In Submissi to the Court.

I.

Defendant's first point and the three propositions therein relied on, as ground for reversal, viz: Effect of the general issue sworn to, no interest chargeable under Illinois laws, and error in awarding execution, must alone reverse this case without a further consideration on the merits of the series of bonds seemingly, but not fairly, involved in this case.

First.

I assume that there are certain fixed rules of pleading and evidence, that apply alike to all actions whether they be against municipal corporations or individuals, which the court is bound by and will enforce in this case as in any case against an individual who is sued upon a written obligation, the execution of which is put in issue by plea verified by affidavit, regardless of consequences.

In the language of the court in *Buchanan vs. Litchfield*, 102 U. S., 293. "It is only necessary to say that the settled principles of law can not, with safety to the public, be disregarded in order to remedy the hardships of special cases."

That the General issue sworn to puts in issue and requires

proof of execution of the coupons and bonds offered in evidence by plaintiff, not only at *common law* but under the *Statute* of Illinois would seem too well settled law to admit of discussion or doubt; and is so fully sustained by the authorities cited, that it is matter of surprise that the Hon. District Judge, who tried this cause, should have disregarded it; as he certainly did do in making these coupons and bonds the basis of the judgment rendered; for it must be admitted that there was no direct proof offered of the genuineness of the signatures to either the coupons *or bonds* offered in evidence, but, on contrary, plaintiff's counsel then insisted that such proof was not necessary.

On the trial when offering his alleged coupons and Bonds in evidence (which were then and there specially objected to, because the signatures and execution thereof were not proven),he denied the foregoing proposition of law, and insisted that it was unnecessary for him to prove signatures and execution, and thereupon risked his case without attempt to prove signatures to coupons *or bonds* and consequently must take the consequences of his own act and erroneous conclusions of law, even if the court below *has* assisted him to his judgment, upon the same mistaken view as to the effects of the general issue filed.

And now, that, it must be apparent, from the authorities cited, that the law, both statutory and the common law, sustain the position of counsel for defendant, counsel for plaintiff, as a last resort, attempts by a specious course of reasoning, citation of authorities that have no application to this case, and assumption of facts and admissions having no existence, in the

record, to overcome or excuse his omission to prove the genuineness of the official signatures to his alleged coupons and bonds, which include, says the Supreme Court of the United States (101 U. S. 699), "not only the genuineness of the signature itself, but the official character of him who makes it."

He first *assumes* as a *fact* (without any proof offered to show the genuineness of signatures thereto, or to identify his *alleged* bonds with the genuine issue mentioned in the "Transcript" of Record of county court) that these instruments he assumes to be genuine bonds of the issue referred to in the "Transcript" are already in evidence before the court, without objection, as "*admitted* genuine Bonds," with the signatures thereto *admitted* to be genuine; and then, upon this false assumption (not warranted by anything in the record contained) seeks to establish the genuineness of signatures to the detached coupons sued on, by a comparison of signatures thereto with those on the bonds.

The doctrine that where signatures "admitted to be genuine" are contained in papers which are inevidence, the court or jury is permitted to compare the *contested* signatures with them, may perhaps be sustained by the authorities cited by counsel but such is *not* the law of Illinois, as declared in *Jumpertz* vs *People* 21, Ill. 407, *Kernin* vs *Hill* 37, Ill. 209.

And it is apprehended that, in no case can such proof be made by comparison, where the genuineness of *all* the papers is denied on oath, disputed and contested, as in the case at bar. Such character of proof is only allowed where the signatures to the paper already in evidence are "*admitted* to be genuine."

But in the case at bar, this principle of proof by comparison of signatures, has no application—the court can *not* "compare the signatures" on the coupons sued upon with those attached to the bonds for the simple reason that the signatures to the latter are no more *proven* or *admitted* to be genuine than those to the former. The plea, objection urged, and contest made, extended as well to the bonds as to the detached coupons sued on.

Had counsel offered some extrinsic proof of the genuineness of signatures to his alleged bonds, or to identify such bonds with those mentioned in the Transcript of Records of county court, there might be *some* ground to invoke the "rule of comparison"; but in the absence of a sinctilla of evidence on that point, counsel's whole argument falls to the ground. It has nothing but assumption and presumption to support it in the face and teeth of the sworn plea, denying and demanding some direct proof of genuineness of signatures to each and all the instruments offered in evidence—bonds as well as coupons.

For aught that appears in this record, in the shape of tangible proof, and so far as this case is concerned, the coupons and bonds offered (the genuineness of which are denied by the plea sworn to) were never executed by the persons whose signatures appear thereto—are not any portion of the genuine bonds and coupons in the orders of the county court mentioned—were never recognized as a part of such issue, and are mere forgeries.

And as to the alleged admissions or recognition by the county or county court of the genuineness of these particular alleged or so called coupons or bonds which plaintiff now produces in court, (and the genuineness of which he has not

proven) or the payment of any interest thereon by the county, they can only exist in the imagination of counsel; for they are not found on record.

Had counsel proven the genuineness of signatures to his alleged coupons and bond there might be some show of reason for the deductions he draws from the various orders of the county court, but until the signatures are proven or at least some *aliunde* proof made that this particular instrument claimed by plaintiff to be one of the identical Bonds referred to in the orders of the county court is in fact one of those bonds, and the genuineness of these alleged coupons and bonds thereby established, they can not be treated as a part of the *genuine* bonds and coupons referred to in, or recognized (as counsel claims) by the said orders of the county court.

Eliminate from the argument the unauthorized assumption that the bonds were not objected to and their genuineness admitted, and assume, for the argument, that counsel is otherwise correct in his law and alleged *admissions* contained in orders of county court, and yet the case, as made by the record stands simply thus:

The County: "We deny that the county ever executed these particular coupons and bonds now sued on."

Plff's Counsel: "Yes, but in and by the orders of the county court you recognize and admit the fact that you *did* execute one hundred $1000 bonds to the Cairo and Vincennes railroad company, and my bonds *might* be some of those bonds."

The County: That may all be very true, but our plea denies the genuineness of your alleged bonds and demands proof,

which proof you have not furnished. Even if we admit that the persons whose names purport to be signed to your alleged bonds were officers of the county duly authorized by the county to execute such bonds, yet you have furnished us no proof that these are their *genuine* signatures, or that they, or the county ever delivered or saw, or knew of these so-called bonds you produce here and simply *allege* to be the bonds of Alexander county, or ever paid a cent of interest upon *these* (merely *alleged*, but not *proven*) bonds, or recognized *them* as instruments executed by those persons, or the county, in any manner, shape or form."

The case cited by counsel in 71 Ill. 424, *Melvin* vs *Hodges*, has no application to the case at bar; for in that case it was proven that the *identical* note *offered* in evidence was in *fact* actually delivered by the party himself with his name signed thereto, thereby vouching for the genuineness of his signature thereto, whether made by himself or some one else.

There certainly is no evidence in this record that the county or the persons whose names purport to be signed to plaintiff's bond, ever in fact, delivered it or saw or knew of its existence before this suit was brought, or it was offered in evidence; and so the above case has no application, and the same may be said as to all his citations—they may be very correct law in a proper case and especially in those particular cases where the law was so announced, where there was direct proof, *aliunde* the instrument itself, that that particular and identical instrument offered in evidence, had been actually delivered by the party himself as his act or deed or subsequently recognized by him as his act, expressly or indirectly by payment of interest.

But, in this case, plaintiff has proven the existence of no such facts with reference to the particular instruments he offers, the genuineness of which is put in issue. He has not offered one sinctilla of evidence that the signatures are genuine, or connecting these papers he offers as genuine, with the genuine bonds referred to in orders of county court.

The counterfeit and the genuine always bear a similarity in terms on their face, but when the genuineness of the former is put in issue, and no proof made of the genuineness of signature, or that it was ever recognized as genuine by the alleged maker, and the genuine instrument itself is not even before the court so that a comparison of signatures is possible, it would violate every principal of the law of evidence, to hold the alleged counterfeit had been *proven* genuine simply because of its similarity in *terms* with the genuine instrument.

Such a holding would be contrary to all precedent. Both the coupons and bonds therefore offered in evidence, the admissibly of which was, on the trial and is now specially objected to because the genuineness of the signatures and their due execution had not been proven, must be excluded and verdict given for defendent, unless it is proposed by the learned counsel to convict this defendant, in violation of every rule of pleading and evidence.

Second.

As to the question of allowing interest on the coupons, it would seem sufficient to merely call attention to the authorities before cited on this point in my brief.

The law of 1849, under which the vote was had, did not

authorize these bonds or coupons to be made payable out of the state; and notwithstanding they are so made payable, such part of the bonds and coupons may be rejected as surplusage, and they are only due and payable upon presentation at the County Treasury.

If payment is desired, a demand therefore should be made at the Treasury; and until such demand the county is not in default; and if not in default, then the right of action is not complete until such demand has been made and proven. Municipalities, unlike individuals, are not, in the State of Illinois and under its laws, bound to seek their creditors or pay elsewhere than at its treasury. (*People vs Taswell Co., 22 Ill., 147; Johnson vs Stark Co., 24 Ill,, 91; City Pekin vs Reynolds, 51 Ill., 529.*)

The statutes of Illinois in regard to interest, do not include counties, and they are not liable to pay interest upon Coupons, in the absence of express agreement so to do. (*City Pekin vs Reynolds, 31 Ill., 529. And other cases above cited.*)

The statutes of Illinois are referred to in above decisions, and the above is the construction put upon the statutes of Illinois, and declared to be the law of this State as respects corporate subscriptions under the law of 1849, years *before* coupons in question were issued. They would seem clearly to hold not only that no interest is recoverable, but also that there is no default and therefore no right of action, until after demand made.

The law of the place of contract, in force at the time coupons were issued must govern. Plaintiff took the coupons

with notice, in and by said decisions, of the law of the State where they were made and under which they were issued, and is bound by that law.

When he received the coupons he did it with full notice and understanding, that a different rule applied in Illinois to municipal corporations from that applicable to individuals:

1st. That they were not bound to seek their creditors out of the state; and were not in default and right of action complete against them until *demand* for payment should be made at their treasury.

2nd. That the coupons, not on their face expressed to be payable with interest, drew no *interest*, most certainly not until after demand made.

What ever may have been the holding of the Federal Court with reference to demand and interest, in certain cases arising in other states, or even in Illinois where the attention of the court was not called to the Illinois statutes, and the uniform decisions of the courts of that state, above cited and rendered prior to issuance of coupons in question; such holding cannot be followed, as respects coupons to Illinois bonds when the statute and above decisions are called to the attention of the court, unless the rule that the *lex loci contractus* is always to govern be ignored.

Third.

As to the error in awarding execution, the authorities cited in the Brief on this point would seem to leave no necessity for further argument.

Indeed, so confident am I that plaintiff's failure to prove genuineness of signatures to bond and coupons, or at least offer some direct proof connecting these instruments offered with the genuine bonds referred to in orders of county court, so as to thereby establish the genuineness of the former, as also awarding interest upon the coupons, and awarding execution against the county, are errors entitling dependent to a reversal that it seems to me unnecessary to enter upon a discussion of the other points of objection which would arise had the genuineness of the instruments sued on been proven, or said errors not appeared in the record; but in my judgment, they are sufficient under the evidence and upon the merits to bar a recovery on these instruments, even if they were shown or admitted to be part of the genuine issue of Bonds issued to the C. and V. R. R. Co.

II.

It is essential to validity of railroad aid bonds issued since new constitution, that there should have been a prior vote authorizing such issuance; and such vote is a jurisdictional fact that must be shown to have an actual existence, regardless of admissions or recitals in the bonds, before such admissions or recitals can be received as evidence, or can work an estoppel.

I respectfully submit that this point is sustained on principle and authorities cited.

The existence of the necessary vote was considered as suf-

ficiently alleged as a fact in the declaration; and the denial of the existence of such fact by defendant's special plea concluding to the country, and plaintiff's *similiter* thereto, admits the necessity of plaintiff proving that fact as a *jurisdictional* fact, to sustain his case; and upon principle—the prohibition of the constitution itself and authorities cited—it is difficult to perceive, how any subscription or donation of bonds, made since new constitution, can be sustained, unless it is true as a *fact*, and so affirmatively appears in the record, that there *was* a *prior* vote authorizing such subscription or donation.

To assert that the legislature, the county or its officers can make a valid subscription or donation, payable in bonds, after the new constitution, in the absence of a *prior* vote authorizing the same, is to make them higher than the constitution and nullify that instrument which is the fundamental law of the land.

The question is certainly one of *power* in its broadest and truest sense; and the very existence of the power is necessarily dependent upon proof of the fact that there *had been* a prior vote of the people authorizing, &c.

And, if when the new constitution went into force, there was no power to enter into an obligation, unless there *had been a prior* vote, it is difficult to perceive upon what principle, admissions or recitals made or acts done, in the absence of any proof of such vote, can *create* power.

The fact, that not even the legislature itself could authorize, or legalize after it was made, a subscription or donation payable in bonds, unless there had in fact been a prior vote

authorizing the same, is conclusive proof that the question whether or not a vote authorizing &c., had in fact been had, is one of *power.*

If this be a question of power; then the existence of the power must be affirmatively shown, outside of mere admissions and recitals; for mere admissions and recitals can not *create* power.

"There must indeed be power * no *bonafides* can dispense with this and *no recitals can excuse it;*" *Davis vs. Huidekoper, 98.* U. S., 100; and U. S., authorities before cited.

Where bonds have "been issued by authority and the power defectively executed, then such acts would operate as an estoppel; but not where there is an entire want of *power; Shaeffer vs. Bonham, 95 Ill., 381.*

"The burden rests upon the party alleging the validity of the bonds issued since the adoption of the constitution to show affirmatively they were authorized by a vote of the municipality under existing laws prior to the adoption of the constitution * What action the board * may have taken since the adoption of the present constitution * is of no consequence, as they had not authority to act in the premises. * The constitution forbids the exercise of such powers. *Town Middleport vs. Aetna Insurance Co.,* 82 Ill., 562.

The constitutional inhibition is general and bars all subscriptions *. Unless the proposed subscription can be shown to be within the saving clause * they are clearly invalid;' *Jackson* Co., *vs. Brush,* 77 Ill. 59.

"Indeed, if it be admitted that when the new constitution went in force there was no power to enter into an obligation; it is difficult to perceive upon what theory or principal admissions or recitals thereafter made, or acts thereafter done, created a power in the very teeth of the constitution itself. It can hardly be the fundamental law of the land can thus be evaded, and the ministerial officers of a municipality confer upon it, by a mere recital, a power it is by that law explicitly prohibited from exercising;" *Lippencott vs. Town of Pana*, 92 Ill., 24, and other Illinois authorities before cited.

The Illinois cases taken together, and the language, as therein expressed *established* the following propositions, to-wit:

First. That "*upon a true construction*" of the constitutional enactment of 1870, municipal corporations or their officers are no longer "*invested with power to decide*" whether the condition precedent of a popular vote under existing laws has been complied with; but on the contrary thereof, it was the clearly expressed purpose and intention of the constitutional enactment aforesaid to "*forbid the exercise of such powers*," and inhibit all subscriptions or donations whatsoever, excepting only those which "*have been* (as a matter of *fact* and law, to be determined by the courts as the newly *appointed tribunal*), authorized under existing laws by a vote of the people."

Second. That upon a like "true construction" of the constitution of 1870, all subscription being prohibited *except*, etc., all subscriptions or donations made, and bonds issued in payment therefor, since the adoption of the constitution must be considered inhibited, and therefore void, unless, by proper proofs, brought within the *exception* that is to say: *shown* to "have

been *authorized under existing laws*, by a vote of the people," etc.

Third. That the municipal officers being no longer the "appointed tribunal" "invested with power to decide," what they may have said or done with reference to an unauthorized subscription, or a subscription or donation *not* in fact authorized under existing laws by a vote of the people, or a subscription or donation attempted to be made upon other terms than those voted, "*is of no consequence*," wholly immaterial, and not binding upon the municipality. These recitals are no longer *municipal decisions*, and therefore they do *not* operate by way of estoppel," and are inadmissible as evidence against the municipality, because made without authority. Hence any argument founded upon the recitals, in bonds issued since the adoption of the constitution of 1870, must fall to the ground, unless it is *first* shown by proper averments in the declaration that the bonds were issued in payment of a donation, loaning of credit or "*subscription * * authorized under existing laws by a vote of the people * * prior to such adoption.*"

The recent state decisions construing that constitution and its effect upon bonds issued *since* its adoption fully sustain my position; and I venture to assert that no well considered case in the Federal Supreme Court, in which the Illinois Constitution of 1870 has been drawn in question and relied on, can be found, asserting a contrary doctrine.

It is true that the Federal Courts are not absolutely bound by the State Court's construction of their own constitution; but the rule is enunciated in manifold decisions and it is the

accepted doctrine that the Federal Courts will *usually* follow such construction—and do follow them except in extraordinary cases where strong reason exist for not doing so; and they can not well ignore them when founded on correct legal principles.

Mr. Dillon, as cited in my Brief, says, p. 20 and 21 :

"The case of Knox County vs. Aspinwall and the numerous cases in the supreme court which had followed it down to 1873, were considered by the writer of the present article to establish the following principles: "*If upon a true construction of the legislative enactment* conferring authority, (viz: to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal are *invested with the power to decide* whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide will in favor of the bond-holder for value bind the corporation."

"This," says Mr. Justus Strong, in one of the latest cases after quoting the above language, "is a very cautious statement of the doctrine of the Supreme Court." And he adds: "It may be re-stated in a slightly different form. Where legislative authority has been given to a municipality or its officers, to subscribe for the stock of railroad company, *and to issue municipal bonds in payment*, but only on some precedent condition, such as a popular vote favoring the subscription, and here it may be gathered from the *legislative enactment* that the officers of the municipality were *invested with power to decide* whether the condition precedent has been complied with,

their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the *appointed tribunal.*

"A correct view of this subject would seem to be this: Officers are the agents of the corporate body; and the ordinary rules and principles of the law of agency are applicable to their acts. Their *unauthorized* acts are not binding upon the corporate body of which they are the public agents. Ordinarily, their unauthorized representation that they have power to do an act is not binding upon the corporation; that is, the question is, as to their power *in fact and in law*, not what they have *represented* it to be * * * Where the authority to act is solely conferred by statute, which, in effect is the letter of attorney of the officer, all persons must, at their peril, see that the act of the agent on which he relies is within the power under which the agent acts; and this doctrine is recognized by the supreme court of the United States in some of its judgments. Accordingly, bonds issued in violation of an express statute or constitution are void, through in the hands of innocent holders, for value."

In Dillon's *Municipal Bonds*," p. 44-45, we find this latter principle more concisely stated as follows:

"A purchaser of municipal bonds is bound * * to take notice of any provisions of the constitution or legislation of the State relating to the *power* of the municipality to issue them * * And the purchaser must also notice the provisions and extent of the legislative enactment on the subject."

The general doctrine announced by Mr. Dillon is reiterated and sustained by all of the more recent cases above cited, viz: *Marcy vs. Town of Oswego, 92, U. S. 637: Commissioners vs. Bolles, 94, U. S. 109: Commissioners vs. January 94, U. S. 205; Town Rock Creek vs. Strong, 96, U. S. 272.* They all proceeded upon the theory that, "where it may be be gathered from the legislative enactment that the officers or persons designated to execute the bonds were *invested with power to decide* whether the contingency had happened or whether the fact existed which was a necessary precedent to any subscription or issue of bonds, their decision is final in a suit by the *bona fide* holder of the bonds;" and in each of the cases will be found language similar to that above quoted, and such expressions as, the plaintiff "may rely upon the decisions made by *the tribunal selected by the Legislature*," etc.

5. In *McClure vs. Town of Oxfoad, 94, U. S. 429* the Supreme Court of the United States expressly hold that:

"The municipality must have legislative authority to subscribe," etc; that "they cannot dispense with any of the essential forms," etc; that "if they do the bonds will be void;" and that "every man is chargeable with notice of that which the law requires him to know, and of that which, after having been put upon enquiry, he might have ascertained by the exercise of reasonable diligence."

6. In *Commissioners vs. Thayer, 94, U. S. 631*, the principle is enunciated that the requisite vote in favor of the proposition to issue bonds is an essential *jurisdictional* fact, and the *foundation* of all subsequent proceedings. The language of the court is:

"Upon this point all the decisions of this court and so far as we know, of all others, concur. If a majority cast their vote *against* the proposition to issue the bonds (or—the court might well have added—never have an opportunity of voting upon the proposition at all) the entire foundation of the proceeding is gone. There is an absolute want of jurisdiction to proceed further in the matter, and an attempt to do so is void, as are all proceedings or issues based upon it."

I may say, right here, that while it is true that the Supreme Court of Illinois has not been disposed heretofore to carry this ingenious doctrine of municipal agency as far as the Federal Court as respects bonds issued *prior* to adoption of the new constitution, as intimated by Schofield C. J., in 88, Ill. 24; yet, the construction and effect of the new constitution, as respects this Federal doctrine of agency (conceding its correctness as applied to bonds issued *prior* to that constitution) is a new and totally different question from the former one; and, involving as it does a construction of the Illinois Constitution, ought to be and will, I believe, receive the same solution as the State Court has given; for such a solution, not only, does not impeach the correctness of the Agency Doctrine heretofore declared by the Federal Court as applied to bonds issued *prior* to said constitution; but is supported by recognized principles of law and sound rules of pleading.

I certainly do not claim that the federal court *will* "change their own unbroken line of decisions to follow a state court decision;" but I have in my brief, endeavored to show the true principle upon which such "unbroken line of decisions

was based," viz: "*These recitals are municipal decisions and operate by way of estoppel because they are decisions made by the appointed tribunal selected by the legislature according to a true construction of the legislative enactment under which they acted, and are therefore res-adjucatur.*"

That this is the true principle upon which that "unbroken line of decision," spoken of by counsel, rests, is abundantly shown by the eminent text writers and federal decisions refered to in my brief, and it is also confirmed by the later decisions, especially *Town of Coloma vs Eaves*, 2 Otto, 484, where the court use almost the identical language above quoted.

Having shown, as it seems to me, that this was the true principle and the only tenable ground upon which said decisions rested or *could* rest, I have then, without seeking to attack that principle or the said "unbroken line of decisions," which my learned friends rely on, endeavored to show that such principle can have no application to recitals made in bonds issued *since* the constitution of 1870, which most positively makes absolutely void all bonds and all recitals thereon; unless, as a matter of *fact* to be determined, *not* by the municipal agents (*whose power is revoked*), but by the courts, like any other fact, that such bonds were "authorized under existing laws *by a vote of the people* * * *prior* to such adoption."

This view is certainly sound; and, being fully sustained by the state decisions, will, I believe, be sustained, when ever the point is directly pressed upon the attention of the Federal supreme court; for I do insist that, in my judgment, the point

now made has never been urged in or passed upon by the Federal Supreme court in any case within my observation.

In County Moultry vs. Rockingham Savings Bank, 2 Otto, 631, no vote was required by law, and a *valid* subscription in Dec. 1869 was *proven;* and that fact *not* any *recitals* in the bonds, was the ground of decision.

In *Town of Coloma vs Eaves*, 2 Otto, 484, the holding of the election July 2, 1869, was not disputed, and the ground of defense was simply some irregularity in the matter of giving notice of such election. Neither the fact that the bonds bore date since 1870, nor the constitution of 1870, were pressed upon the attention of the court or even incidentally referred to. The case cannot be regarded as an authority that recitals since 1870 are binding without proof of the requisite prior vote; for the prior vote was admitted and constitution not relied on.

In *Marcy vs Warren Co.*, 97 U. S., 96, the proofs show there was in fact a prior vote, and an irregularity as to notice was alone set up; constitution was not relied on or referred to; and what I have said in regard to *Coloma* vs *Eaves* may likewise be said as to this case. The court did not refer to or pass upon said constitutional question.

In *Bonham vs Needles* and *Harter vs Kernochan*, 103 U. S., 563, 648 the bonds were actually issued *prior* to new constitution.

In *Walmut vs Wade*, 103 U. S., 683, prior vote was proven *alunde* the recitals.

In *Jasper vs Ballon*, 103, U. S., 745, no question of recitals was involved.

In *Roberts vs Balles*, 101, U. S. 119, the prior vote was admitted by plea, and a mere irregularity in the election pleaded in defence.

In *Buchanan vs Litchfield, 102 U. S. 278*, 289, 590, &c., it is seriously questioned if the principle that, "municipal officers are the appointed tribunal to decide," &c., and their recitals therefore binding, has any application to the constitution provision in regard to incurring municipal indebtedness, although such provision operates in *futuro*, and there ought necessarily be some appointed tribunal to decide when such future contingency shall happen.

This case presents a strong intimation in favor of the non-application of the above principal to the constitutional provision applicable to bonds issued since 1870 the power to issue which depends, *not* upon a future contingency but upon a *fact in presenti*, and of the existence of which the *courts* may not only well be regarded as the proper tribunal to determine, but must necessarily be, unless it be the intention of the law that municipal officers, by false recitals, shall have it in their power to abrogate the constitutional prohibition.

The very *existence* of the power is dependent upon the *fact* that the *subscription* or *donation*, under which the bonds were issued, was authorized "*by a vote of the people*" had *prior* to the adoption of the constitution.

Establish the vote *first* by proper proof and *then* the *power* is shown, and the *execution* of the power thus *shown to exist*,

may with show of reason be sustained as against informalities and irregularities, by admissions and recitals in the bonds thus made under the power thus shown to *exist.*

If no vote is shown, de-hors the admissions or recitals of the bonds, the power does not attach—has never been granted and has no existence—and without the power, the admissions or recitals are mere idle words uttered without authority and of no more force than the utterances of a mere stranger.

It seems to me therefore that neither of the cases relied on by counsel can be regarded as authority against the point I now make, and in behalf of which (conceding to its fullest extent the settled doctrine of the Federal Court as applied to bonds issued or authorized to be issued *prior* to said constitution) I now specially invoke and rely upon said constitution, as an absolute revocation of authority in the municipal officers to make subscriptions or issue any bonds in payment thereof, with or without recitals, unless, as a matter of fact the same *had* been "authorized under existing laws *by a vote of the people* * * *prior* to such adoption."

Since such adoption, municipal officers are not, as theretofore, the general agents of the municipality to issue such bonds under an "existing law" upon happening of a precedent condition *therein* provided for and of which they are constituted the judges; but they are *special* agents with no power whatever in the premises; and as to whom said "existing law" has no vitality, unless; as an *actual* fact, a certain event *has already* taken place.

The question is one of *power* in its truest sense; and the

very existence of the power is dependent upon proof of the fact that these special agents *had been* empowered and authorized &c., *by a vote of the people.*"

If there was no such vote then the power does not attach —has never been granted and has no existence; But if such vote is alleged, and admitted or proven, *then* it *may* be, that the Federal Court will go so far as to hold that the *existence* of the power, being thus *admitted* or *alleged* and *proven*, the municipal officers are remitted to their *general* agency and all the powers granted them under said "existing law," the same as though the constitution had never been adopted; and as a consequence their recitals and acts *since* adoption of said constitution are governed by the same rules of law and have the same effect as heretofore declared by the courts.

I do not think the Federal Court *has* yet so held, in any case in which the constitution of 1870 has been pressed upon the attention of the court and relied on; But even if it should go that far or *has* so held (and I do not believe it possible for it to extend the doctrine further); Yet it is plain to be seen, that even in this view of the law, the fact that the municipal officers were authorized &c., "*by a vote of the people*," and that such vote was under an existing law and *prior* to said constitution, must *first* be admitted or proven *in order to establish the existence of the power*, and *make* the recitals &c., evidence against the people &c.

Hence I assert, as correct conclusion of law, that recitals found in bonds bearing date and admitted to have been issued *since* constitution of 1870, can not work an estoppel as against the municipality, or bind it—at least not until it is first shown

as a *fact* necessary to constitute the agency and *confer the power* that such bonds were *within the saving clause of the constitution,* viz: were issued under and in conformity with a a prior vote authorizing same; and a vote to issue bonds as a subscription does not prove a vote to donate, or authorize a donation.

III.

Said donation contract of Nov. 25, 1867, was unauthorized by the vote therein recited and was void, as are also the bonds issued in conformity with it, the same having been issued as a donation and not a subscription as voted by the people.

First.

Not only did the law of 1849, (ch. 862, sec. 80, Gross Stat. 1878,) under which the vote was had, not authorize a *donation;* but the fact affirmatively appears in this record that the only vote ever had by the people was for issuance of Bonds as a *subscription* and not as a *donation*; and that the bonds in question bore date and were issued *after* the adoption of the constitution.

If they were issued as a *donation,* they certainly were not *authorized* by any vote of the people had under existing laws prior to the constitution, and are not within the saving clause of that instrument.

The proof shows that the only action taken, tending to show a subscription prior to the constitution, was the making of said

contract of Nov. 25, 1867 (Rec. 18); and that this contract was afterwards annulled and declared void by the order of court of Dec. 5, 1870 (Rec. 21), thus leaving no action taken in matter of subscription prior to the new constitution.

The proofs further show that afterwards by the order of court of March 6, 1872 (Rec. 23) the court assumed to make what it *called* a subscription, but which simply, in effect, revived and re-affirmed the old contract of Nov. 25, 1867; and that in conformity with the terms of this contract the county [Rec. 26] instead of subscribing for, receiving and owning $100,000 of stock in this Railroad company and issuing $100,000 of bonds therefor as voted by the people, in truth and fact issued and delivered the bonds in question to this company, without receiving or owning one dollar of stock in the concern.

How indeed was it possible for any set of men to more squarely and successfully have *donated* $95,000 of bonds to a railroad company than was done in this case?

Had the decision in *Town Concord* vs *Savings Bank* (2 Otto, 625) remained as the law of the land, inhibiting all donations after constitution went in force, could such a transaction as this whereby the people were robbed of $95,000 of bonds with no equivalent whatever to show for it, be considered aught else than a *donation*.

And is it any reason now, because the case of the *Town of Concord* vs *Savings Bank*, has been overruled, and donations, when authorized *by a vote of the people*, &c., brought within the saving clause of the constitution, that a donation of bonds—not authorized by any vote of the people—should be held valid?

The contract in question, it is true, starts out in the guise of a subscription, but ends only in a simply donation—It says in effect, and might just as well have said so in words: We will issue $95,000 of bonds to the R. R. Co., as a donation. It says, we will *nominally* subscribe $100,000 stock as voted; but we will *really* so subscribe it as to make it in *fact* a donation of $95,000. We will *call* it a subscription to evade the law and the vote, but we do so with the express understanding that it shall operate as a donation. You need not call upon us for a $100,000 subscription to your stock payable only upon assessments of stock as other stockholders pay and as the act of '49 expressly requires and the people voted, but we will, upon fulfillment of conditions on your part, donate to you $95,000, instead of taking your stock. I repeat what is said in my brief:

"Courts will only look at the *substance* and not the idle and deceitful *from* of the contract. The *pretended* subscription and the *actual* donation are one and the same act, and its ultimate legal effect must be considered as a whole in order to determine what it is. Municipal officers can not do *indirectly* what they are forbidden to do *directly*.

The language used is a mere subterfuge to evade the law of '49 and thwart the will of the people as expressed in their vote

It is expressly declared in the subsequent order of the court, Dec. 5, 1870, (Rec. 21) to have been a donation, and so recognized in said "amended charter" attempting to legalize it (laws 1869, vol. 3, p. 259;) and such it in fact was and is."

Had the County Court bona fide subscribed for stock,

issued bonds in payment for that stock, and received, owned and controlled it, and then afterwards sold it, as a separate transaction, a different question would be presented; but here the transaction was one and the same, and bears on its face so palpably all the ear-marks of a *donation*, in purpose, intention and result, that it would be an outrage upon the English language, especially when the County Court and the Legislature itself has characterized it as a donation, to call it by any other name.

Had the County Court simply said we hereby *donate* $95,000 of Bonds, &c., there could hardly be a doubt but what such donation would have been held void, as not authorized by the act of '49 or the vote of the people.

How then can they be upheld, when the county court did say the same thing in legal effect?

Although the word "donate" is not used in this contract, the language used and the legal effect is the same as though it *were* used; and the contract is just as unauthorized by the said "vote of the people" had under the "existing law" of '49, as it would have been had the contract been striped of its subterfuge and the word "donate" been actually used.

"The obligations under existing laws can not, since the adoption of the constitution, be *enlarged* or *materially changed* * —*all power is taken away* and the utmost that can be done is to make and complete the subscription previously voted under existing laws, upon the *same terms and conditions as voted*. Subscriptions * upon *other terms* would obviously require new consent on the part of the people * which can not be for want of *power*.

Town Middleport vs. Aetna Ins. Co., 82 Ill., 562.

Town Concord vs. Portsmouth Savings Bank, 2 Otto 625., and authorities before cited.

Applying the principles announced in the latter case, it seems hardly possible for the Federal Supreme Court to hold bonds valid, which were issued as a mere *donation*, when the vote of the people was for a *subscription*.

Second.

Said void and unauthorized contract of Nov. 25, 1867 (Rec. 18) could not be legalized by said "amended charter" (Laws 1869, vol. 3, p. 259.) and the attempt to do so, was in violation of the constitution and void.

The record in this case shows:

1st. That it is "admitted" (Rec. 29) that the county court took no action prior to constitution in matter of subscription other than to make said contract of Nov. 25, 1867 (Rec. 18).

2nd. That the railroad company having failed to comply with the conditions of said contract with reference to the time of commencement and completion of the road as therein provided or subsequently extended (Rec. 20 and 21), and said contract being also otherwise not in accordance with the vote for a subscription, but a mere unauthorized donation as specified in the said order of Dec. 5, 1870 (Rec. 21), said contract was, in and by said last mentioned order, rescinded and overruled, thereby leaving no contract or other act of subscription in existence prior to the adoption of the constitution.

3rd. That the bonds were issued *after* the adoption of the constitution, and *not* under said contract of Nov. 25, 1867; but under and in pursuance of said order of March 6, 1872 (Rec. 23), *reviving* the previously overruled contract of Nov. 25, 1867, or, in other words and legal effect, making a *new* contract (misnamed a subscription) similar to said old contract by thus reviving it and making it part and parcel of that order.

In view therefore of the said facts thus disclosed by the record, and the further fact that said amended charter only attempted to legalize the donation contracts theretofore (prior to 1869) already made and not the making of *future* donation contracts, and, even if it did authorize future donation contracts, when the people had not voted for a donation, the new constitution had, prior to the said order of Dec. 5, 1870, intervened to cut off all donation not voted for by the people or already contracted for prior to its adoption, it would seem to be an immaterial question whether said amended charter had the legal effect of legalizing said contract of Nov. 25, 1867 or not.

But I insist that the authorities cited in my Brief on this point (92, U. S. 289: 84 Ill., 463; and 61 Ill., 218,)' fully establish the proposition that the Legislature could not force upon the county a donation not voted for by the people.

IV.

The recitals in these bonds are insufficient to estop the county, even if admissible as evidence.

First.

If it be the law, as declared in *Davis vs. Hindekoper, 98 U. S., 100,* that there must indeed be *power,* * no *bonafides* can dispense with this and no *recitals can excuse it.*"

If it be also the law, as declared in *Commissioners vs. Thayer,* 94 U. S. 631, that the requisite vote in favor of any subscription or donation is essential to the creation of the power, and without it "there is an absolute want of jurisdiction to proceed further in the matter, and an attempt to do so is void, as are *all proceedings or issues* based upon it;"

And if it be a fact, as the proofs show, that the people never *did* vote for a donation, and that the bonds in question were issued as a donation;

Then the conclusion must follow that there was a total want of *power,* and "no *bonafides* can dispense with this and no *recitals can excuse it.*"

Second.

"A purchaser of municipal bonds is bound * "to take notice of any provisions of the constitution or legislation of the State relating to the *power* of the municipality to issue them" * And the purchaser must also notice the provisions and extent of the legislative enactment on the subject." *Dillon's Municipal Bonds,*" p. 44, 45; and *Buchanan vs. Litchfield,* 102 U. S., 278, 289, 290 &c.

"The municipality must have legislative authority," &c; they can not dispense with any of the *essential* forms;" "if they do the bonds will be void;" "every man is chargeable with notice

of that which the law requires him to know, and of that which, *after having been put upon inquiry*, he might have ascertained by the exercise of reasonable diligence;" *McClure vs Town of Oxford*, 94, U. S., 429.

The recital in these bonds is: "This bond is issued under and in pursuance of an order made by the County Court of Alexander county, and authorized by a vote of the citizens of said county and in accordance with the laws of the State of Illinois."

Unlike *Town Colona vs Evans, 2 Otto 484;* and *Marcy vs Warren, 7 Otto 96*, it fails to recite *when* this vote was had; and the constitution gave public notice that such bonds were void unless the vote was prior to 1870.

The failure of the recital to specify the date of the vote and bring the bonds within the constitutional proviso, was sufficient to have put the purchaser upon inquiry.

Being thus put upon inquiry, the only evidence he would have found in the county records of any vote prior to the new constitution, would be the donation contract of Nov. 25, 1867, reciting a vote for *subscription* and yet making a *donation;* and the subsequent "amended charter" (a public law, of which he was bound to take notice and required to know was unconstitutional in so far as it attempted to legalize the void contract,) would have further advised him that said contract was a donation and unauthorized by the vote: and the subsequent order of Dec. 5, 1870, (Ex. B. p. 9,) would also show him the public declaration of the county court itself that said contract was a donation and void; and the whole record, the very order itself

of March *6*, 1872, (Rec. 23) referred to in recital and subsequent orders would have shown the uultimate issue of these bonds in pursuance of said original donation contract revived and made anew after the new constitution went into force forbidding the donation not voted for.

In short being "put upon inquiry" he would by the exercise of ordinary diligence" have learned that the recitals were false and the bonds void.

Third.

The recitals not only do not, by reason of failure to specify *date* of alleged vote inform the purchaser that the bonds are within the saving clause of the constitution, but they fail to show or recite that the bonds were issued "in accordance with the "*Constitution of Illin ois*;" and all that is said in *Buchanan vs. Litchfield*, 102 U. S.; 278, 289, 290 &c., in regard to the recitals of the bonds in that case, apply with same force to the case at bar; and upon the authority of that case I insist in my Brief that the recitals in plaintiff's bonds are insufficient to estop defendant from proving, as the record offered by plaintiff affirmatively shows, that "This bond is" *not* issued under and in pursuance of an order made by the county court of Alexander county, and *authorized* by a vote of the citizens of said county" *had prior to July* 2, 1870, and in accordance with the laws of laws of the State of Illinois," *and the constitution thereof.*

V.

Under the issues made by the declaration and pleas, the evidence offered was wholly insufficient to warrant a verdict.

First.

Besides the bonds, coupons, auditor's certificate, charter

and amended charter, there was no evidence of any kind offered, except the "*Transcript of record of county court*" (Rec. 17 and 27), with an admission (Rec. 29) that said transcript "contained and showed the *only* action taken by the county court or the people with reference to the issuance of bonds to the Cairo & Vincennes railroad company."

With reference to this "transcript," it may be briefly summarized as follows:

It shows no action whatever on part of county *prior* to July 2, 1870, except:

1st. An order of county court made June 4, 1867, calling election July 16, 1867, to vote on proposition to "*subscribe* to the capital stock" of said company "$100,000 in bonds" of said county, (Rec. 17).

2nd. An order of county court made Nov. 25, 1867, entering into a certain contract, with said company, which, after reciting that "on the 16th day of July, 1867, by a vote of the electors of Alexander county at an election held in said county, the county court was authorized to make a *subscription of $100,000* to the capital stock of said railroad company, and pay for said stock in bonds of said county," then proceeds in fact and legal effect, *not* to make a *subscription of* $100,000, in accordance with such *alleged* vote but to make a *donation* of $95,000 of bonds, upon certain conditions named; and which said contract, in direct violation of the alleged vote, it recites, was and is unauthorized by it, and therefore void, and, being void inadmissible as evidence, (Rec. 18-19).

3rd. An order made May 20, 1868, extending time for com-

mencing work on road, thirty days from May 25, 1868, (Rec. 20).

4th. An order made July 16, 1870, extending time for construction of road to Dec. 1, 1872, *provided* it is commenced by Dec. 1, 1870, (Rec. 20).

In addition to said four orders, made *prior* to July 2, 1870, calling election, making a void donation contract, and extending time, said transcript also contained other orders of court made *after* July 2, 1870, as follows:

1st. Order of Dec. 5, 1870, reciting said donation contract of Nov. 25, 1867, and declaring it to have been unauthorized by any vote of the people and void, and rescinding same; thus leaving no action on part of county prior to July 2, 1870, except said order of June 4, 1867, calling an election and said two orders extending time (Rec. 20-21).

2nd. Orders of March 11, and May 2, 1871, refering to a proposition of railroad company to again recognize and continue in force the old rescinded donation contract, &c., and refusing so to do, but expressing a willingness to make a simple *subscription* as voted upon certain conditions; which proposition is not accepted by the company or acted on. (Rec. 21-23.)

3rd. Order of March 6, 1872, making a $100,000 subscription, but in *fact*, substance and legal effect, rcognizing and continuing in force said old donation contract and agreeing to make *not* a $100,000 *subscription*, but a $95,000 donation of bonds to said railroad company, as specified in the old contract; which order therefore, was just as authorized by the alleged vote of the people, as the said old original donation contract, which is

referred to in the order, and which recites an alleged vote for *subscription* and not *donation*, (Rec. 23.)

4th. An order of March 11, 1872 that the bonds of C. & V. R. R. Co., be issued *this term* and placed in hands of Trustees (Rec. 23).

5th. Order of March 12, 1872, *not* authorizing the persons whose names appear signed to those bonds and coupons respectively to execute them on behalf of the county, but simply reciting the fact, that "Be it remembered that on this day," 100 county bonds of $1000 each drawing 8 per cent. interest and payable 20 years from date, July 1, 1872, at City of New York were issued to Cairo & Vincennes railroad company, signed, sealed and delivered to Safford, Taylor & Schuh as trustees to hold until said company is entitled under said donation contract to receive same (Rec. 24).

6th. Orders of June 5, and Dec. 27, 1872, showing delivery Dec. 14, 1872 by said trustees to said railroad company, in accordance with said donation contract of Nov. 25, 1867, $95,000 of the bonds so held by said trustees, and in and by said contract agreed to be donated to said company; which contract of *donation* made in violation of the vote recited therein for a *subscription*, and subsequently repudiated, Dec. 5, 1870, as being unauthorized by said vote, and then, in defiance of such vote re-affirmed March 6, 1872, is thus, in and by these last two orders, finally executed Dec. 27, 1872, by delivery of these $95,000 of bonds to said railroad company as a mere *donation*, wholly unauthorized by any vote of the people had prior to July 2, 1870, or at any other time (Rec. 23 and 26).

7th. Orders of March 6, and March 7, 1873, approving receipt of County Treasurer to trustees for the $5,000 of bonds (in their hands *not* delivered to the R. R. Co.), and destroying same (Rec. 26 and 27).

(1.)

If the bonds and coupons are excluded, as they must be (see Point I.) because the genuineness of signatures was not proven and no evidence offered showing that the *alleged* bonds offered were part of the *genuine* bonds referred to in orders of county court, or that the detached *alleged* coupons sued on were *genuine* coupons from such bonds; then there is no evidence before the court on which to base a verdict for plaintiff.

(2.)

Even if genuineness and due execution of bonds and coupons *had* been proven; yet, if the *donation* contract of Nov. 25, 1867, is excluded, as it should be (see Point III,) either because no prior vote had been proven, or because such contract was unauthorized by the vote for *subscription* therein recited and therefore void, or because such contract was *annulled* by order of Dec. 5, 1870, then there is no evidence of any action on part of county prior to July 2, 1870, and no evidence whatever of any *prior* vote, except the alleged admissions made *after* July 2, 1870.

(3.)

And, if it be law, that it is absolutely essential to the validity of these bonds, issued since July 2, 1870, that plaintiff should prove the allegation of his declaration (denied by defendants

pleas and made one of the special and material issues in this case) that such issuance of bonds was authorized by a vote of the people prior to July 2, 1870; and if it be also the law that such allegation can not be established by the mere admissions of official officers, executing the bonds, made *after* July 2, 1870; (as shown in Point II.), then the said orders of court and certificate filed with auditor *after* July 2, 1870, can not be admitted as proof of a prior vote and said allegation of declaration being not proven, the issue joined thereon must be found for defendant.

(4.)

But, even if all the evidence of plaintiff were admitted without objection, and the admissions therein contained received as evidence against defendant; yet they only establish the fact, that on July 16, 1870, the people voted for a simple *subscription of $100,000;* and that the county court, Nov. 25, 1867, made a void contract to *donate* $95,000 of bonds, which was attempted to be legalized by the legislature Feb'y 9, 1870 rescinded by the county court as void Dec. 5, 1870, re-affirmed and continued in force March 6, 1872, and finally executed June 5, and Dec. 27, 1872, by delivery of $95,000 of Bonds to said railroad company as a mere *donation.*

So that, if it be the law that, since July 2, 1870, the county authorities have no power except to execute the will of the people as expressed in their vote, and that a vote for a *subscription* will not authorize a *donation,* (as shown in Points II and III); then, said issuance of bonds as a donation was unauthorized and the bonds void; unless the county is estopped by the recitals in said bonds.

(5.)

But admissions or recitals made in bonds issued since July 2, 1870, as to the jurisdictional fact necessary to confer power, viz., a *prior* vote authorizing their issuance, can not estop the county from showing, as the record in this case shows, that no vote was had authorizing this donation of bonds; (see Point II.) and even if recitals would estop, the recitals in these particular bonds are not sufficient to work such estoppel, as shown in Point IV.

Hence, in any view of this case, there was no evidence to support the special findings of the court, or the general finding of the issues for plaintiff.

In support of these bonds it is averred in the declaration that the defendant *retained the stock* and subsequently *paid interest* on the bonds for a series of years; but there is no proof to support these allegations. The county never received, much less *retained*, a dollar's worth of stock. It *gave* away $95,000 of bonds and never got a cent for them in shape of stock or anything else (*see* report of trustees Rec. 26); and the simple fact that the Trustees say in this report, "as we detached all the coupons due Jan'y 1, 1873 from said bonds, the county will owe the C & V. R. R. Co., *sixteen days* interest on same, which amounts to $337.82" and the county *thereupon* (Rec. 25) ordered a county order to be issued for that amount, as part and parcel of the transaction attending the fraudulent delivery whereby these bonds were donated, certainly does not prove the allegations of the declaration as to payment of interest.

But even if it did, I beg to say that the doctrine of estoppel

by payment of interest or holding stock is a harsh one, and has never been applied in cases where there was a total want of *power* and the bonds absolutely void, as they are in this case.

In *Culing vs City of Racine*, 1 Bissel, 316, the point of objection was that the law under which the bonds were issued was invalid or not in force—The court held that it was valid and in force. This was decisive of the case, and the remarks of Miller J., sitting as a Circuit Judge, in reference to paying interest and receiving stock are mere "make weight" and unnecessary to the decision of the case; and

In *Pendleton County vs. Amy*, 13 Wallace 305, the matter of the holding of the stock was also unnecessary to the decision, and all the views expressed in the opinion did not receive the approval of the whole court.

In both cases the matter of stock and interest may be regarded as *dictum*, and "make weight," and even if it were otherwise it should be observed that the controversy related to bonds issued *prior* to the constitution under an existing *power* defectively executed, and in pursuance of an *admitted* law authorizing the bonds—of the fulfillment of the conditions of which law the municipal officers were constituted the judges.

Second.

Even if the bonds are valid, no recovery could be had upon the coupons because making them payable out of the State was unauthorized by the law of 1849 under which they were

issued, and no demand at the county treasury before suit was proven.

This proposition seems to me sustained by authorities cited on this point in my brief, and needs no elaborate argument to sustain it.

They decide, not only that coupons can not be made payable out of the State without express authority, and that no interest is chargeable under the laws of Illinois, where none is agreed to be paid, but that, until demand is made at the treasury, the county is not in *default.* If not in default, then no right of action has accrued. The coupons being *wrongfully* made payable in New York, must be deemed payable in Illinois; and the law of the latter State, where they were made, and where this suit was instituted must control this case.

IN CONCLUSION,

I respectfully submit that plaintiff is well entitled to a reversal of the judgment below, upon the several errors assigned.

1st. Because the law did not authorize the awarding of an execution against defendant.

2nd. Because plaintiff was not entitled to interest upon his coupons by the *lex loci contractus,* under which they were issued.

3rd Because the genuineness of the coupons and bonds respectively was denied on oath by defendant and no evidence offered by plaintiff to prove the same.

4th. Because no vote of any kind was proven, outside of admissions and recitals made since new constitution, the dona-

tion contract of Nov. 25, 1867 being excluded as void, or annulled.

5th. Because the alleged vote was for a *subscription*, and the bonds were in fact issued as a *donation* unauthorized by the vote or the law of '49.

6th. Because the "amended charter" legalizing the donation was void or inoperative to accomplish that purpose.

7th. Because plaintiff was put upon inquiry by the peculiar recital in the bonds, the constitution and the "amended charter," and had, or could have had full notice of the validity of the bonds had he examined the order ~~the~~ referred to in recital and contract therein referred to and other orders of record.

8th. Because recitals of the bonds if accepted as true brings the case within *Buchanan vs. Litchfield*, 102, U. S., 278, and work no estoppel,

9th. Because no *demand* of payment of coupons was made at county treasury before suit; in consequence of which no default or right of action is shown.

As to the alleged hardships of the case, in its effect upon plaintiff, we have nothing to do.

In the language of the court in *Buchanan vs. Litchfield*, 102 U. S., 293; "It is only necessary to say that the settled principles of law can not, with safety to the public, be disregarded in order to remedy the hardships of special cases."

WM. B. GILBERT,
Attorney for Plaintiff in Error.

16-623

OFFICE SUPREME COURT U.S.
JAN 9 1883

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1882.

No. 1091.

THE COUNTY OF ALEXANDER, *Plaintiff in Error,*

vs.

JOHN F. KIMBALL, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

T. C. MATHER,
ATTORNEY FOR DEFENDANT IN ERROR.

SPRINGFIELD:
H. W. ROKKER, PRINTER AND BINDER.
1882.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

This cause was submitted for trial by the court, without a jury, by stipulation of parties, under the law of Congress of March 3, 1865, sec. 4. (Rec. p. 14).

The bill of exceptions purports to contain all the *evidence* offered at the trial (pp. 15 to 29, inclusive).

After the evidence on page 29 of Record, follow two special findings of the court, viz:

1st. "That the said coupons and bonds offered in evidence had been duly executed and delivered by defendant.

2d. "That they had been so executed and delivered as a subscription to the capital stock of the Cairo & Vincennes Railroad Company, in pursuance of and according to a vote of the people, had under existing laws prior to the adoption of the constitution of 1870."

The Record then proceeds to state (p. 29): "That upon the special findings aforesaid, the court thereupon found the issues for plaintiff, and assessed his damages at the amount of said coupons, with six per cent. interest thereon from their maturity."

The Record (p. 29) then proceeds to state that the defendant below thereupon excepted, and objected to the special finding, the *general finding*, and the assessment of damages.

The Record (p. 29) sets out the nature of the objection and exception to the special findings, viz: that they were *not justified by the proof.*

And as to the *general finding* for plaintiff, *that the same was not justified by the proofs*, and was contrary to the *evidence.* (Rec. p. 29).

We cannot see how counsel for plaintiff in error can make out, as he seems to by his bill of exceptions, that there was *both* a special and *general* finding by the court. Under the act of March 3, 1865, the finding by the court may be either special *or* general. It could hardly be both.

But what is meant by this portion of the bill of exceptions, we presume, is, that defendant below objected to the two special findings of facts by the court as not justfied by the *evidence;* and, secondly, that objection was also taken to the court rendering judgment for plaintiff below upon such facts so specially found.

This being probably the meaning of the exceptions meant to be preserved in the bill of exceptions by counsel for plaintiff in error, the inquiry arises, what is presented by the record *for the review* of this court?

Counsel for plaintiff in error prepares his brief upon *three propositions,* which he says, are all covered by the errors assigned, and exceptions taken, and either of which is sufficient to reverse the judgment. P. 27 of his brief.

His first proposition is, that plaintiff below did not produce *such proof* as proved the genuineness and due execution of the coupons and bonds offered in evidence, as against objections made to its admission at the time. Our answer to this is, that the court made a special finding of the facts—*that the coupons and bonds offered in evidence had been duly executed and delivered* by defendant.

This finding is *conclusive* of this question, and this court will not assume the functions of a trial court, or jury, and examine the *evidence* to see whether this finding was justified by the evidence.

Norris v. *Jackson,* 9 Wall. 127.
Copelin v. *Insurance Co.,* 9 Wall. 467.
Insurance Co. v. *Sea,* 21 Wall. 161.
Coddington v. *Richardson,* 10 Wall. 518.

Counsel's second and third propositions raise questions of law concerning the awarding of interest, and an execution in the judgment entered, which we will notice hereafter.

Counsel's brief is mainly taken up with authorities and arguments based upon the idea that this court will review the *evidence at large*, as contained in the bill of exceptions, and determine *from it* whether or no the judgment was justified *by the evidence.*

We have already seen, by the authorities cited, that this court will not review the evidence to ascertain whether the *special findings* of the trial court were justified by it; neither will it review the *evidence* to determine whether the judgment was justified by it.

> *Miller* v. *Life Insurance Co.* 12 Wall. 300-1, and 303.
> *Insurance Co.* v. *Folsom*, 18 Wall. 249.

Our understanding is, that this court will only look into this evidence, set forth at large in the bill of exceptions, for one purpose, viz, to determine whether the trial court committed error in admitting evidence against objection. This would be a ruling of the court during the progress of the trial, and which this court, under proper exceptions, will review where a cause is submitted under the act of March 3, 1865.

But the only other thing the court may do, under said act, in this case, is to review the special findings, and determine whether *they* authorize the judgment.

These special findings, we venture to say, make a strong and unimpeachable case for sustaining the judgment rendered.

The bonds and coupons had been *duly* executed and delivered *by defendant*. They had been so executed and delivered as a subscription to the capital stock of the C. & V. R. R. Co., in pursuance of, and according to, a vote of the people, had under existing laws prior to the adoption of the constitution of 1870.

Take the recitals in these bonds, in connection with these special findings, and the existing laws set out in the record, and how could any court do otherwise than find a judgment for the plaintiff?

The special findings cannot be gone back of. The law of 1849, as well as the charter and amendments of the C. & V. R. R., are set out in the record, or sufficiently referred to as public laws, and the recitals of the bonds are not disputed after the execution of them is once established; so all these things must be conceded, and cannot be inquired into or behind, and we deem it useless to argue to the court, or produce authority, that they make a complete case for the plaintiff below.

So then, leaving *the evidence* out of sight, and going by the special findings, the contents of the laws, and bonds, we assert with confidence that the judgment was not only justified by them, but could not have been otherwise.

Did the court err in admitting the evidence offered at the trial by plaintiff below? Or in other words, did the court err in its rulings during the progress of the trial?

We think, undoubtedly, the records of the county court established the execution of the bonds. (Record, pages 23 to 28.)

If the records only *tended* to prove the execution it would be admissible and hence the ruling of the circuit court in considering it would not be error.

Prather v. *Vineyard*, 4 Gilman, 40.
Hough v. *Cook*, 69 Ill. 581.

There is abundant proof furnished from these county court records that a favorable vote was had on the 16th of July, 1867, authorizing a subscription of $100,000. (Pages 17 and 18 of Record.)

Its being in the form of *recitals* makes no difference. The 1st section of the law of 1849 provides that the stock subscribed for shall be under the control of the county court, the same as if owned by an individual, and certainly whatever an individual owning stock might admit regarding it, if in litigation, might be used as evidence against him in way of admission. So in this case, the county court being the statutory business agent for the county regarding the calling, canvassing, etc., of the election, result of it, with dates of holding it, etc., its records referring to the same in any particular, certainly would be admissible evidence, tending to prove what was recited. Besides it would be tolerating a fraud to allow the county now to say these recitals are not true.

County of Moultrie v. *Bank*, 2 Otto, 637.

Hence we insist there was no error in the rulings of thec ourt in admitting, or considering, this evidence contained in the certified copy of the county court records.

As to the effect or sufficiency of that evidence, as justifying the special findings, we have already adverted to and shown

that it cannot be reviewed for that purpose, as the findings speak for themselves, and are not subject to review here.

Counsel make great point over the fact that these bonds were, after they were voted as a subscription, converted into a donation by the county. This question, we submit, cannot come up in this collateral way. It does not concern the bondholders, who are in no way responsible for it. Besides the special finding is, the bonds were executed and delivered *as a subscription*. This is conclusive, so far as the bondholders are concerned. If it was a proper inquiry in this suit, the power given the county court by section 1 of the law of 1849, referred to above, as well as section 3 of the amended charter of the C. & V. R. R. Co., would be ample authority for their making the kind of disposition of the stock they did.

Counsel also claim that it was an erroneous ruling to admit in evidence bonds and coupons issued after July 2, 1870, upon proof that subscription, etc., was not made, as shown by the county records, until after that date.

The clause of the Illinois constitution referred to, only forbids subscriptions after its adoption where there had been *no prior vote* under law authorizing it; but in this case the recital of the county court records, and in their contract with the company, contained in their proceedings of *June 4th, 1867*, show there was a prior vote. (Pages 17 and 18 of Record.)

The special finding on this point also concludes that question.

There is no point in the argument that the county court, at one time after July 2, 1870, annulled the contract, and then again revived it. All this the court had the power and the right to do, there having been the constitutional prerequisite,

viz: a prior vote. This point was passed upon by this court in *Randolph County* vs. *Post*, 3 Otto, 513. If, then, we are correct that the special findings cannot be reviewed, and that they amply justify the judgment, and the court has committed no error in its rulings during the progress of the trial in admitting evidence, then there is nothing left in this record to consider, except the objections to the judgment set out in counsel's second and third propositions, viz: that the form of the judgment entered by the court awards *execution* and allows *interest* on the coupons. We submit there was no error committed upon either of these points.

The law governing this matter of interest upon this class of commercial paper being, "that power to issue bonds carries with it authority to the municipal officers to make the bonds and coupons payable in another State."

Lynde vs. *The County*, 16 Wall. 13.

Besides this implied power to make them payable out of the State, the court will observe the bonds themselves recite they are issued in accordance with the *laws* of the State of Illinois; not alone the law of 1849, but the charter of the Cairo & Vincennes R. R. Co., and its amendment, the former found in 2d volume Private Laws of Illinois, 1867, p. 561, and the latter in 3d volume Private Laws of Illinois, 1869, p. 260. The tenth section of the former and the fourth section of the latter expressly confer this power. Both acts, by their terms, are public laws.

The court will observe the coupons sued on are expressly made payable at the National Bank of Commerce, New York. (Record, p. 6). Hence the allowance of interest upon them

after due, would be governed by the law of the place where payable, and we understand, by the law of New York six per cent. was allowable after due. It has been the constant ruling of this court to allow interest on this kind of negotiable securities after due, even when none is contracted for in the instrument, and without proof of demand or presentment.

Gilpecke vs. *Dubuque*, 1 Wall. 206.
Aurora City vs. *West*, 7 Wall. 105.
Town of Genoa vs. *Woodruff*, 92 U. S. 502.

Other authorities are to the same effect.

2d vol. Daniel's Neg. Inst. 471, which cites a long list of authorities.
Fauntleroy vs. *Hannibal*, 5 Dil. C. Ct. 219.
Gray vs. *State*, 72 Ind. 567.

We do not understand that upon these questions of commercial law this court will feel constrained to follow the decisions of the Illinois Supreme Court, unless they are satisfactory to it.

Pine Grove vs. *Tolcott*, 19 Wall. 677.
Roberts vs. *Bolles*, 101 U. S. 128–9.

The reasonable doctrine upon this interest question has also been stated by some authorities to be, that judgment should only be refused for interest where the defendant corporation could show a continued readiness to pay at the time and place of payment.

2 Daniel's Neg. Inst., 473.
North Penn. R. R. Co. v. *Adams*, 54 Penn. 97.

Upon the question of execution being awarded, we understand it is merely done to lay a foundation for a mandamus proceeding to enforce a special tax to pay, and for such purpose the practice has been approved by this court.

Clemens on Cor. Sec. 95, citing *Riggs* v. *Johnson County*, 6 Wall. 166, and *Heine* v. *Com'rs.*, 19 Wall. 657.

But, in conclusion, we do not see how these matters referred to in counsel's second and third propositions can be reviewed upon this record, because the entry of judgment was no ruling of the court *during the progress of the trial*, and no proposition of law, upon these points, or either of them, was presented to the court and its ruling thereon asked.

Insurance Co. v. *Sea*, 21 Wall. 160.
Miller v. *Ins. Co.*, 12 ib. 300.

So far as this interest item is concerned the verdict of the court is general,—there is no special findingas to whether demand had been made when due or not (which under Illinois decisions would entitle to interest.)

And the only way a party can have a review of the judgment is by having special findings upon the points involved, or else the finding is a general one, and in that event the court will not review.

Norris v. *Jackson*, 9 Wall. 128-9.

There are neither special findings nor propositions of law presented and ruled upon in regard to the interest. Hence we insist for this reason the judgment ought to be affirmed.

Respectfully submitted.

T. C. MATHER,
Attorney for Defendant in Error.